No.

In the Supreme Court of the United States

WILLIAM H. HOGAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF ALASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

KALTAG TRIBAL COUNCIL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Alaska is home to roughly 230 Native Villages that are federally recognized as Indian tribes. Under this Court's decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), none of those tribes (save one not at issue here) occupies Indian country. The population of members and nonmembers living within and around Alaska Native Villages is relatively interspersed, increasing the prevalence of children born to parents of different Native Villages or to one Native and one non-Native parent. The Ninth Circuit—the circuit that sets the precedent for virtually all federal cases involving Indian tribes in Alaska—has adopted an extraordinarily broad conception of the jurisdiction and authority of Alaskan tribes, which fails to account for the fundamental limits repeatedly recognized by this Court on the exercise of tribal authority with respect to nonmembers. The question presented is as follows:

Whether the Ninth Circuit correctly held—in conflict with the decisions of this Court and other courts as well as with the express intent of Congress—that the hundreds of Indian tribes throughout the State of Alaska have authority to initiate and adjudicate child custody proceedings involving a nonmember and then to compel the State to give full faith and credit to the decrees entered in such proceedings.

PARTIES TO THE PROCEEDING

Petitioners are William H. Hogan, Patrick B. Hefley, and Phillip Mitchell. Hogan and Hefley are sued in their official respective capacities as Commissioner and Deputy Commissioner for Family, Community, & Integrated Services of the Alaska Department of Health and Human Services. Mitchell is sued in his capacity as Section Chief of the Alaska Division of Vital Statistics. Defendants-appellants below were Karleen Jackson, William H. Hogan, and Phillip Mitchell. Hogan and Hefley have been substituted for the previously named defendants (who were also sued in their official capacities) pursuant to Supreme Court Rule 35.3. Petitioners have responsibility for issuing new birth certificates recognizing valid adoptions in Alaska.

Respondents, plaintiffs-appellees below, are the Kaltag Tribal Council of the Native Village of Kaltag, and Hudson and Salina Sam. The Kaltag Tribal Council is the elected leadership of the Native Village of Kaltag, a federally recognized tribe headquartered within the city of Kaltag, Alaska. Hudson and Salina Sam are not members of the Village of Kaltag. After purporting to terminate the parental rights of N.S.'s natural parents, the Kaltag Tribal Council bestowed permanent guardianship on the Sams, and later purported to authorize their adoption of N.S.

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PETITION FOR WRIT OF CERTIORARI

William H. Hogan, in his official capacity as Commissioner of Alaska Department of Health and Human Services, *et al.* (collectively, the "State of Alaska" or "Alaska"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.1a-3a) in this case is reported at 344 Fed. App'x 324. The opinion of the court of appeals in *Native Village of Venetie I.R.A. Council v. Alaska* (App.29a-58a)—on which the court of appeals expressly grounded its decision below, App.2a-3a—is reported at 944 F.2d 548.

The opinion and order of the district court (App.4a-20a) granting summary judgment for respondents and denying summary judgment for petitioners is unpublished. The tribal court adoption decree and related orders (App.21a-28a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2009. App.1a. A timely petition for rehearing and for rehearing en banc was denied on October 14, 2009. App.59a-60a. On January 7, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 11, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. § 1901 *et seq.*, are reprinted at App.61a-78a.

INTRODUCTION

This case raises jurisdictional issues of extraordinary importance concerning the authority of Indian tribes in Alaska over individuals who are not tribal members outside Indian country. Specifically, it arises from a dispute between the State of Alaska and the Native Village of Kaltag—a federally recognized Indian tribe in Alaska—concerning the tribe's effort to enforce a decree entered in a child custody proceeding involuntarily initiated in tribal court involving non-members domiciled outside of Indian country.

Relying on its prior decision in *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991) ("*Venetie I.R.A. Council*"), the Ninth Circuit

held that the tribe possessed the jurisdiction and authority to initiate such a child custody proceeding and to compel the State to give full faith and credit to the tribal court decrees entered in that proceeding. App 2a. Among other things, the court refused to attach any significance to the fact that one of the natural parents—and both adopting parents—are not members of the tribe. That decision directly conflicts with the decisions of this Court and other courts refusing to permit "'the extension of tribal civil authority over nonmembers on non-Indian land.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2722 (2008) (quoting *Nevada v. Hicks*, 533 U.S. 353, 360 (2001)). Indeed, the Ninth Circuit's conception of tribal jurisdiction and authority over nonmembers domiciled on non-Indian land is fundamentally out of step with this Court's precedents.

The Ninth Circuit's decision also unravels the statutory scheme devised by Congress in the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. § 1901 *et seq.* After carefully balancing the interests of parents and children, States, and tribes in such matters, Congress chose to authorize the *transfer* from state court to tribal jurisdiction of child custody proceedings involving Indian children off-reservation, but *only* "absent objection by either parent" or "good cause to the contrary." 25 U.S.C. § 1911(b). The Ninth Circuit rule permits tribes to circumvent the ICWA's transfer provision—and its important checks—by simply initiating child custody proceedings in tribal court *first*. And, as such, it invites a dangerous race by tribes to exercise jurisdiction in such sensitive matters—to the potential detriment not only of the

State's *parens patriae* interests but of the welfare of the affected children and their parents.

The Ninth Circuit's decision has enormous practical consequences for the State of Alaska, as well as the thousands of children of mixed tribal or ethnic heritage who live in Alaska and their parents. Alaska is home to roughly 230 federally recognized tribes—none of which occupies Indian country (save one). Under the Ninth Circuit rule, any one of these tribes could initiate—and thereby establish jurisdiction over—custody proceedings without regard to whether the parents are members of the tribe. And given that the population of members and nonmembers living within and around Alaska Native Villages is relatively interspersed, it is commonplace for child custody proceedings in Alaska to involve parents of different tribes or one Alaskan Native and one non-Native parent. Indeed, the State's child protection service is currently overseeing *hundreds* of active cases in which a child has parents who are members of two different tribes.

Given the profound importance of rules governing the reach of tribal authority over nonmembers outside of Indian country, not to mention matters concerning the well-being of children and the heart of the parent-child relationship, this Court's review is needed.

STATEMENT OF THE CASE

A. Statutory Background

1. The State of Alaska, like all States, has a duty and a "special, indeed compelling, interest in the health, safety, and welfare of its minor citizens." *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 582 (Alaska 2007). In carrying out that special duty, the State has enacted a comprehensive child in need of aid

(CINA) statute and related child protection laws and regulations. *See* Alaska Stat. §§ 47.10.005-.142 (CINA); *id.* §§ 47.17.010-.290 (child protection). These provisions apply to all children in Alaska and "shall be liberally construed to ... promote the child's welfare and the parents' participation in the upbringing of the child to the fullest extent consistent with the child's best interest." *Id.* § 47.10.005. Among other things, Alaska's CINA law imposes special requirements on the conduct of hearings and the orders that may be entered in such cases. *See id.* §§ 47.10.070-.084.

2. Congress passed the ICWA in 1978 "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. The Act establishes two mechanisms whereby Indian tribes—including Alaska Native Villages, 25 U.S.C. § 1903(8)—may assert jurisdiction over Indian child custody proceedings. First, Section 1911(a) provides that tribes shall have "[e]xclusive jurisdiction" to adjudicate a "custody proceeding involving an Indian child who resides ... within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law." 25 U.S.C. § 1911(a). Second, Section 1911(b) authorizes the "transfer" from state court to tribal jurisdiction of custody proceedings involving "an Indian child not ... residing within the [tribe's] reservation"—but only "absent objection by either parent" or "good cause to the contrary." *Id.* § 1911(b). The Act further obligates States to "give full faith and credit to the ... judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent" as other proceedings. *Id.* § 1911(d).

The ICWA creates a variety of mechanisms to enable Indian tribes to assert an interest, if they so choose, in a state child custody proceeding involving an Indian child domiciled *outside* the reservation. First, the ICWA requires that state courts provide notice to a child's tribe that a custody proceeding is pending in state court, *id.* § 1912(a), and authorizes the tribe to intervene in that proceeding, *id.* § 1911(c). Second, Section 1918 sets out a separate process by which an Indian tribe may petition the Secretary of the Interior in order to obtain either exclusive or referral jurisdiction over "child custody proceedings" in certain circumstances. *Id.* § 1918.[1] Finally, tribes may enter into consensual agreements with States respecting the care and custody of Indian children and jurisdiction over child custody proceedings. *Id.* § 1919.[2]

B. Factual Background

1. The Native Village of Kaltag is a federally recognized Indian tribe in Alaska. Like almost all other Indian tribes in Alaska, the Village of Kaltag does not occupy Indian country. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998). Instead, it exists as part of a municipality—the city of Kaltag—located in west-central Alaska on a 85-foot

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[1] Three Alaska Native Villages—but not respondent here—have applied for and received the Secretary's approval under Section 1918 to exercise certain jurisdiction under Section 1911.

[2] Likewise, Alaska law provides tribes with mechanisms by which they may trigger state executive or judicial action regarding child welfare. *See, e.g.*, Alaska Stat. § 47.10.020 (affording any party the right to ask the state to undertake an investigation of a child's circumstances).

bluff along the western bank of the Yukon River. The town lies along the Kaltag Portage, an ancient trail leading east through the nearby mountains to Unalakleet, used by Natives and fur traders centuries ago—and used today as part of the Iditarod Trail Dog Sled Race, for which Kaltag is a checkpoint. Although the site was long used by Koyukon Athabascans as a cemetery, the town of Kaltag was not established until the early twentieth century, at the peak of steamboat activity along the Yukon River, when individuals from nearby seasonal villages resettled to Kaltag following local food shortages and a measles epidemic.[3]

In 2008, Kaltag had 188 inhabitants—both Native and non-Native, though primarily the former. The city of Kaltag has a mayor, a state-owned and operated airport, a health clinic, and a public school. The Village of Kaltag exists as a separate government. It elects a Tribal Council composed of five members, which, among other things, is empowered to create temporary ordinances and to "act as judges of minor offenses or small differences among village residents." App.82a.

2. This case arose when the Village of Kaltag initiated involuntary child protection proceedings in Kaltag Tribal Court—an arm of the Tribal Council—involving N.S., a child born on October 18, 1999. N.S.'s mother is a member of the Village of Kaltag. N.S.'s father is not; he is a member of the Native Village of

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[3] *See* Alaska Division of Community and Regional Affairs, State of Alaska, *Alaska Community Database Community Information Summaries*, *available at* http://www.commerce.state.ak.us/dca/commdb/CIS.cfm?Comm_Boro_name=Kaltag (last visited Feb. 4, 2009).

Koyukuk, located some 50 miles to the northeast. App.4a. In 2000, the Kaltag Tribal Council took "emergency custody" of N.S. due to concerns about her mother's ability to care for N.S. and her physical well-being and initiated an action with the Kaltag Tribal Court resulting in the tribal court's assumption of "temporary custody" of N.S. App.4a-5a.

In 2004, the Kaltag Tribal Court placed N.S. with Hudson and Selina Sam for foster care. App.28a. The Sams are not members of the Village of Kaltag, but rather of the Village of Huslia, located some 117 miles to the northeast of Kaltag in the Koyukuk National Wildlife Refuge. Later that year, the Kaltag Tribal Court purported to terminate the parental rights of N.S.'s biological parents, make N.S. a ward of the Tribal Court, and grant permanent guardianship over N.S. to the Sams. App.26a. In 2005, after the Sams petitioned their own tribal court to adopt N.S., the Kaltag Tribal Court issued an Order of Adoption decreeing that N.S. "shall be the child of [the Sams] for all legal purposes from this time forward." App.22a. At no point during this time was the State of Alaska made aware of these tribal court proceedings.

The Kaltag Tribal Court submitted its adoption decree to the Alaska State Bureau of Vital Statistics and requested a new birth certificate for N.S., listing the Sams as N.S.'s new parents. App.5a. Alaska notified the Kaltag Tribal Council that the tribal court had no jurisdiction or authority to initiate adoption proceedings in this matter and invited the Kaltag Tribal Council to submit a "cultural adoption" packet instead. *See* 7 Alaska Admin. Code tit. 7, § 5.700 (recognizing cultural adoptions executed under tribal custom). The Kaltag Tribal Council then commenced

this action in federal district court under the ICWA and 42 U.S.C. § 1983, arguing that the State was obligated to give effect to the Kaltag Tribal Court's adoption order under the ICWA's full-faith-and-credit provision, 25 U.S.C. § 1911(d), and seeking declaratory and injunctive relief to that effect. App.6a.

C. Decisions Below

1. The district court granted summary judgment for respondents. The court recognized that the child custody proceedings at issue were neither "voluntary, nor among [tribal] members," App.16a. The court nevertheless concluded that the tribe possessed jurisdiction to initiate and adjudicate the proceedings. *See* App.16a-19a. In so holding, the court agreed with respondents that "the substantive issues in this case already have been decided by the Ninth Circuit in [*Venetie I.R.A. Council*]." App.15a. The court therefore ordered the State to give full faith and credit to the tribal court's decrees under the ICWA § 1911(d), and to issue N.S. a new birth certificate. App.19a.

2. The Ninth Circuit affirmed. The court held that the conclusion that the State was required to give full faith and credit to the tribal court's adoption decree was "compelled by this circuit's binding precedent"—namely, *Venetie I.R.A. Council*. App.2a. Indeed, the court was apparently so convinced of that conclusion that it reached its disposition in an unpublished decision. The Ninth Circuit subsequently denied the State's petition for rehearing. App.59a-60a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision in this case holds that Alaska's Indian tribes have the jurisdiction and authority to initiate and enforce child custody

proceedings involving nonmembers residing off-reservation. For three overriding reasons, that decision merits this Court's review. *First*, the sovereign authority of the State vis-à-vis Indian tribes—not to mention the State's ability to carry out its *parens patriae* duty to provide for the well-being of its children—is a matter of exceptional importance. *Second*, the Ninth Circuit rule rests on a far-reaching conception of tribal authority over nonmembers living off-reservation, which directly conflicts with the decisions of this Court and other lower courts, as well as with the express intent of Congress. And *third*, the Ninth Circuit's decision has enormous practical consequences for Alaska, where there are hundreds of Indian tribes throughout the State and thousands of Indian children with at least one nonmember parent. Certiorari, in short, is plainly warranted.

I. THE QUESTION PRESENTED IS EXTRAORDINARILY IMPORTANT AND SHOULD BE RESOLVED BY THIS COURT

The question presented by this case concerns a matter of vital governmental importance. As underscored by the legion of cases that this Court has decided throughout its history establishing—and enforcing—the limits of tribal sovereign authority vis-à-vis the States, the authority of Indian tribes to regulate matters traditionally reserved to the States is an issue of touchstone importance. Under the Ninth Circuit's decision below—and the "binding [circuit] precedent" on which it is based, App.2a—the roughly 230 Indian tribes in Alaska possess the sovereign power to initiate and adjudicate child custody proceedings involving nonmembers outside Indian country. What is more, because the domicile of a

nonmember parent is irrelevant under the Ninth Circuit rule, App.17a, there is no territorial limit—not even Alaska's—on the scope of an Indian tribe's authority over nonmembers in child custody matters.[4]

The Ninth Circuit rule affects thousands of parents and children. According to the 1990 census, more than 70% of married Indians nationwide married outside their race, and approximately 50% of Indian children have at least one non-Indian parent.[5] In Alaska, moreover, it is particularly common for children to be born to parents of different tribes or to one Native and one non-Native parent. Unlike Indian tribes in lower 48 States, "[t]he Native villages and communities of Alaska were not organized on 'tribal' lines, and the village rather than the ethnological tribe [was] the central unit of organization." *Atkinson v. Haldane*, 569 P.2d 151, 155 n.12 (Alaska 1977). Indeed, many villages

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[4] This is not a matter of academic significance. Under the ICWA, Native Alaskan Villages have intervened in a number of custody proceedings arising in state courts outside Alaska involving children of mixed tribal or ethnic heritage. *See, e.g., In re Taylor*, 2006 Ohio 6025 (Ct. App. Nov. 13, 2006); *Mahaney v. Mahaney (In re Interest of Natasha Mahaney)*, 51 P.3d 776 (Wash. 2002); *In re Crystal K.*, 226 Cal. App. 3d 655 (Ct. App. 1990). Yet, under the decision below, they could involuntarily initiate such proceedings in tribal court.

[5] *See* U.S. Census Bureau, *1990 Census of Population and Housing*, Table 2, Race of Couples: 1990 (June 22, 1994), *available at* http://www.census.gov/population/socdemo/race/interractab2.txt (last visited Feb. 8, 2010); *id.* at Table 4, Race of Child by Race of Householder and of Spouse or Partner: 1990 (June 22, 1994), *available at* http://www.census.gov/population/socdemo/race/interractab4.txt (last visited Feb. 8, 2010).

will extend membership to any person of Alaskan Native descent, without regard to one's ancestral village(s) or particular ethnic heritage.[6] Likewise, the practical realities of modern village life make intra-tribal relationships unexceptional. Many Alaskan villages are composed only of several dozen families or less, and are declining in size due to out-migration (especially of women), increasing the likelihood and necessity of relationships outside the village.[7] And a sizable portion of Alaska's Natives do not live in villages at all, but in urban Alaska—almost 30% in Anchorage, Fairbanks, and Juneau alone. In such settings, relationships between members of different tribes or Natives and non-Natives are commonplace.

For all these reasons, child custody proceedings often involve parents who are members of different Alaska Native Villages. *See, e.g., In re Adoption of Sara J.*, 123 P.3d 1017, 1020 (Alaska 2005); *Evans v. Native Vill. of Selawik IRA Council*, 65 P.3d 58, 59 (Alaska 2003); *In re C.R.H.*, 29 P.3d 849, 850 (Alaska 2001). Indeed, Alaska's Office of Children's Services is currently overseeing *hundreds* of active cases in which a child is potentially eligible for membership in two (or more) tribes as a result of a mixed tribal heritage.

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[6] *See, e.g.*, Native Village of Eyak, *Enrollment Eligibility*, http://www.nveyak.com/pages/enrollment.html (last visited, Feb. 8, 2010); Native Village of Koyuk Const. and Laws art. 2, § 4, *available at* http://www.kawerak.org/tribalHomePages/koyuk/const.html (last visited Feb. 8, 2010).

[7] *See, e.g.*, William Yardley, *Alaska's Rural Schools Fight Off Extinction*, N.Y. Times, Nov. 26, 2009, at A1; *see also* Stephanie Martin, *The Effects of Female Out-Migration on Alaska Villages*, Polar Geography, 32: 1, 61-67 (2009).

Likewise, in part because Alaska's communities have long been integrated, many Alaskan children share a mixed Native and non-Native heritage. Historically, most Indian tribes in the contiguous United States were long sequestered from a local, non-Native population that often became the Indians' "deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). In contrast, Alaskan Natives were never displaced from their aboriginal lands by treaty or war, and "[t]here was never an attempt in Alaska to isolate Indians on reservations." *Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 51 (1962). To the contrary, Alaska natives have always been integrated into Alaskan society to a degree rarely present with respect to the Indian tribes in the lower 48 States. Stephen Haycox, *Alaska: An American Colony* 162 (2002) (discussing the role of Alaska natives in settling towns and assisting important industries).

This history of integration and multiculturalism is manifest and still at work in Alaska today. In the 2000 decennial census, for example, Native Alaskans comprised only 33.4% of the 172,000 individuals residing in "Alaska Native Village statistical areas."[8]

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[8] National Center for Educational Statistics, U.S. DOE, *Status and Trends in the Education of American Indians and Alaska Natives: 2008*, U.S. Dep't of Commerce, *Summary Population and Housing Characteristics*, table 34, based on *Decennial Census, 2000, available at* http://nces.ed.gov/pubs2008/nativetrends/tables/table_1_2d.asp (last visited Feb. 8, 2010). By comparison 96.4% of the 180,000 individuals populating the Navajo reservation identified as Navajos. Navajo Nation, *An Overview of the Navajo Nation—Demographics*,

And the degree of integration is even greater in urban Alaskan settings. It follows that marriages and relationships between Native Alaskans and non-Native Alaskans, and among members of different Alaska Native Villages, are relatively commonplace across the State, and that thousands of children are members of such families. As a result, it is practically routine for a child custody dispute to involve one Alaska Native parent and one non-Native parent, or parents from different Native Villages. *See* p.11 n.14, 12, *supra*.

The extraordinary importance of this case to the State of Alaska is alone a compelling reason to grant the writ. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 526 (certiorari granted to determine whether lands conveyed under the Alaska Native Claims Settlement Act constitute Indian country); *Okla. Tax Comm'n v. United States*, 319 U.S. 598, 599 (1943) (certiorari granted "because of the importance of the cases in the administration of Indian affairs and to the state of Oklahoma"). "At issue here is not only Indian sovereignty, but also necessarily state sovereignty as well." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 181 (1980) (Rehnquist, J., concurring in part).

And the importance of this case is magnified by the subject matter of the underlying dispute. This case concerns the exercise of jurisdiction over—and the termination of—the parent-child relationship. As this Court has observed, "a natural parent's desire for and right to the companionship, care, custody, and

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http://www.navajobusiness.com/fastFacts/demographics.htm (last visited Feb. 8, 2010).

management of his or her children is an interest far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (internal quotation marks and citations omitted); *see also Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (describing the right to child custody as "essential"). There is an undeniable need for clear jurisdictional rules governing the exercise of government authority in court proceedings concerning the parent-child relationship.

This Court has granted certiorari on several prior occasions to address the proper allocation of authority among States and Indian tribes over child custody cases.[9] It is imperative—for the State and citizens of Alaska—that the Court do so again here.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS, AS WELL AS WITH THE INTENT OF CONGRESS IN THE ICWA

The question presented in this case is not only exceptionally important, but also the subject of a sharp conflict of authority. Indeed, the Ninth Circuit's decision directly conflicts with the decisions of this Court and other federal and state courts, as well as with the intent of the National Legislature.

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[9] *See, e.g., Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), *Fisher v. Dist. Court of Sixteenth Judicial Dist.*, 424 U.S. 382 (1976) (per curiam); *DeCoteau v. Dist. County Court for Tenth Judicial Dist.*, 420 U.S. 425 (1975).

A. The Conflict With This Court's Cases

The Ninth Circuit's conclusion that Alaska's Indian tribes possess the power to initiate and adjudicate child custody proceedings involving nonmembers even when domiciled outside Indian country represents a dramatic departure from this Court's precedents.[10]

1. This Court has since the days of Chief Justice Marshall "recognized Indian tribes as 'distinct, independent political communities' qualified to exercise many of the powers and prerogatives of self-government." *Plains Commerce Bank*, 128 S. Ct. at 2718 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)). At the same time, however, the Court has long emphasized that Indian tribal sovereignty "is of a unique and limited character." *Id.* (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)); *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650

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[10] The fact that the Ninth Circuit's decision in this case is unpublished in no way cuts against granting certiorari. According to the Ninth Circuit, the result in this case was "compelled by ... binding [circuit] precedent," i.e., *Venetie I.R.A. Council*. App.2a. This Court frequently grants review of unpublished decisions that are governed by binding circuit precedent. *See, e.g., Hardt v. Reliance Standard Life Ins. Co.*, No. 09-448 (U.S. Jan. 15, 2010); *Crawford v. Metropolitan Gov't of Nashville*, 552 U.S. 1162 (2008). Moreover, under the Ninth Circuit's rules, an unpublished decision may be precedent under the rules of issue preclusion. Ninth Cir. R. 36-3. Because Alaska's courts have rejected the argument that collateral estoppel does not lie against the State, *see State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 961-62 (Alaska 1995), Alaska may well be precluded from relitigating this issue in future cases. *Cf. Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 689-90 (9th Cir. 2004) (looking to Idaho state law to determine whether to apply nonmutual collateral estoppel against Idaho).

(2001) ("inherent sovereignty of Indian tribes was limited to 'their *members* and their *territory*'") (citation omitted) (emphases added). "'[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'" *Plains Commerce Bank*, 128 S. Ct. at 2718-19 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)) (alteration in original). In particular, as this Court has observed, "with one minor exception, we have *never* upheld ... the extension of tribal civil authority over nonmembers on non-Indian land." *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (emphasis added); *see Plains Commerce Bank*, 128 S. Ct. at 2718 (noting that tribal sovereignty focuses "on tribal members within the reservation").[11] Accordingly, it is well-settled that "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are *'presumptively invalid.'*" 128 S. Ct. at 2720 (citation omitted) (emphasis added).[12]

Weighty constitutional and practical considerations support the limits on tribal authority over nonmembers outside the reservation. Tribal sovereignty is "a sovereignty outside the basic structure of the Constitution." *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring). A tribe's jurisdiction

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[11] As the Court explained in *Plains Commerce Bank*, even the lone "exception"—which involved a tribe's zoning restrictions on nonmember fee land *within* a reservation—"fits the general rubric noted above." 128 S. Ct. at 2722.

[12] To be clear, the State does not challenge the inherent sovereignty of federally recognized tribes in Alaska. The purpose of this petition is to seek clarification of the precise *scope* of that sovereignty in the specific context of jurisdiction over nonmembers residing off-reservation in child custody proceedings.

over its members is "justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent." *Duro v. Reina*, 495 U.S. 676, 694 (1990). In contrast, "nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory." *Plains Commerce Bank*, 128 S. Ct. at 2724.

The Ninth Circuit's decision below directly conflicts with those precedents. In particular, the Ninth Circuit failed to account for the fact that—as the district court recognized (App.16a)—the child custody proceedings in this case were *not* "among tribal members." Rather, as discussed, both the biological father and the adopting parents were members of *other* villages. App.4a-5a. Moreover, this case was initiated as an *involuntary* child custody proceeding concerning a child who was removed by tribal authorities from her mother's home, and involved the termination of a nonmember's parental rights. *Id.* Under this Court's precedents, the involvement of nonmembers domiciled outside of Indian country defeated the tribe's assertion of jurisdiction and authority in this case. Indeed, the Ninth Circuit's decision in this case propounds a conception of tribal sovereignty that vastly exceeds that recognized by any of this Court's precedents.

What is more, the Ninth Circuit grounded its decision in this case on circuit precedent—*Venetie I.R.A. Council*—that not only was decided before this Court issued its landmark decision in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. at 523, on the scope of Indian country in Alaska, but that pre-dates many significant pronouncements by this Court on the scope of tribal sovereignty as to nonmembers off-

reservation, including *Plains Commerce Bank*, *Hicks*, and *Atkinson Trading Co.* Without even recognizing the import of those controlling precedents, the Ninth Circuit simply invoked *Venetie I.R.A. Council* and held that the district court's decision ordering the State to give full faith and credit to the tribal court's adoption decree was "compelled" by that case. App.2a. There is no reason for this Court to leave the Ninth Circuit case law frozen in time—at *Venetie I.R.A. Council*.

The lower courts held that "it is the membership of the child that is controlling, not the membership of the individual parents." App.17a. That is incorrect—and fails to account for the vitally important rights and interests of *parents* at stake in such proceedings. As this Court has observed, "the interest of *parents* in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (emphasis added). And it should go without saying that child custody proceedings—especially those seeking to *sever* the bonds of natural parents from their children—directly concern the rights of *both* children and parents. *See Parham v. J.R.*, 442 U.S. 584, 601-02 (1979) (recognizing that the due process interests of *both* parents and children are implicated by child commitment proceedings); *Santosky*, 455 U.S. at 759 (decision to terminate parental rights works "'a unique kind of deprivation'" of a *parent's* "fundamental liberty interest") (citation omitted). Indeed, the tribal court decree at issue expressly purported to terminate the rights of both natural parents "from this time forward." App.22a. Moreover, as this case illustrates, the fact that a child

custody proceeding *involves* a member does not mean that the proceeding is *among* members.[13]

B. The Conflict With Other Courts' Cases

The Ninth Circuit's decision also conflicts with the decisions of other lower courts. In particular, the other circuits with the greatest responsibility for the maintenance of Indian law have recognized that tribal membership is ordinarily *indispensable* to the exercise of tribal jurisdiction. *See, e.g., Nord v. Kelly*, 520 F.3d 848, 853-54 (8th Cir. 2008) (tribal court lacks jurisdiction over nonmember even where accident arises on the "equivalent of non-Indian fee land within the reservation"); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998) (The Supreme Court's decisions do not "allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*."); *see also MacArthur v. San Juan County*, 497 F.3d 1057, 1070-71 (10th Cir.), *cert. denied*, 552 U.S. 1182 (2007).[14] In the Ninth Circuit, in stark

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[13] To be sure, the ICWA looks to the domicile of the Indian child to determine what statutory rules apply. *See* 25 U.S.C. § 1911(a), (b). Congress is free to use that short hand. But that by no means leads to the conclusion that the nonmember status of a parent (or other party) is irrelevant to the exercise of the tribe's *inherent* authority over such an individual when it comes to, say, the termination of his parental rights.

[14] Other circuits have recognized these fundamental limitations on the exercise of tribal sovereignty as well. *See, e.g., Bank One, N.A. v. Shumake*, 281 F.3d 607, 612 (5th Cir.) ("[T]ribes usually do not have jurisdiction over non-Indians for activities off the reservation or Indian-fee land"), *cert. denied*, 537 U.S. 818 (2002); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 180 (2d Cir.

contrast, tribal status is not a prerequisite to tribal jurisdiction over an individual domiciled outside of Indian country. App.17a.

Similarly, in *Roe v. Doe*, 649 N.W.2d 566 (N.D. 2002), the North Dakota Supreme Court concluded that, where two parents of *different* tribes both lived outside their respective reservations at all times relevant to a paternity dispute, "the existence of any tribal court jurisdiction, much less exclusive tribal court jurisdiction, is questionable." *Id.* at 576 (quoting William C. Canby, Jr., *American Indian Law In A Nutshell*, 194-95 (1998) ("When the tribe or its member sues a nonmember for a claim arising outside of Indian country, tribal jurisdiction is more doubtful."); *see also In re Defender*, 435 N.W.2d 717, 721 n.4 (S.D. 1989) (in child custody dispute, tribal court had no subject matter jurisdiction over a nonmember parent who had conducted no activities on that tribe's reservation). But in the Ninth Circuit, the fact that a parent is a nonmember living off-reservation has no bearing *at all* on the existence of tribal court jurisdiction. App.17a.

Alaska's own courts have struggled for decades to determine whether or to what extent Alaska Native Villages have sovereign authority over child custody proceedings. *See, e.g., Native Vill. of Nenana v. State of Alaska, Dep't of Health & Social Servs.*, 722 P.2d 219, 221 (Alaska 1986) (concluding that tribes had *no* authority independent of the ICWA to initiate jurisdiction over child custody proceedings), *overruled*

1996) (recognizing that "tribal inherent sovereign powers ... do not extend to the activities of nonmembers of the tribe") (internal quotation omitted).

on other grounds by In re C.R.H., 29 P.3d 849 (Alaska 2001); *In re F.P.*, 843 P.2d 1214, 1216 (Alaska 1992) (rejecting Ninth Circuit's contrary view in *Venetie I.R.A. Council* that tribes had concurrent jurisdiction, and holding that "[n]othing in [*Venetie I.R.A. Council*] persuades us to change our opinion" in *Nenana*); *John v. Baker*, 982 P.2d 738, 743 (Alaska 1999) (holding that, in child custody dispute *outside* the ICWA's scope, tribes "possess the inherent sovereign power to adjudicate child custody disputes between tribal members in their own courts").[16]

The difficulty that the Alaska courts have had grappling with this important issue underscores the need for guidance from this Court.

C. The Conflict With The Intent Of Congress

The Ninth Circuit's decision also conflicts with the intent of Congress in the ICWA and, indeed,

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[16] The Alaska Executive Branch has also propounded opposite opinions on this question. *Cf. State v. Native Vill. of Tanana*, Alaska S. Ct. No. S-13332 (challenge to 2004 Op. Atty. Gen. Alas. No. 1, 2004 Alas. AG LEXIS 16 (Alaska AG 2004)) (formal Attorney General Opinion concluding that state courts have exclusive jurisdiction over child custody proceedings unless a tribe obtains case transfer under section 1911(b) of the ICWA or petitions for jurisdiction under section 1918); 2002 Informal Advice Memorandum from Donna Goldsmith, Assistant Attorney General to Jay Livey, Commissioner of Department of Health and Social Services Regarding *In re C.R.H.*, 29 P.3d 849 (Alaska 2001) (Alaska A.G. File No. 441-00-0006, Mar. 29, 2002) (informal client advice concluding that tribes have concurrent jurisdiction with the State in child custody proceedings covered by the ICWA) (reproduced in *Tanana*, Alaska S. Ct. No. S-13332, Tanana Excerpt of Record at Exc. 358-63).

significantly undermines the carefully calibrated scheme established by that Act for handling child custody disputes involving Indian children. As explained, the ICWA establishes guidelines for exercising jurisdiction over such disputes, which are grounded on whether an Indian child lives on the reservation. Indeed, the legislative history indicates that Section 1911(a) was intended to "confirm[] the developing Federal and State case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled *on the reservation*." H.R. Rep. No. 95-1386, at 21 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7544 (emphasis added). But Congress made equally clear that it did not intend "to oust the States of their traditional jurisdiction over Indian children falling within *their* geographic limits," *i.e.*, off the reservation. *Id.* at 19, *as reprinted in* 1978 U.S.C.C.A.N. at 7541 (emphasis added).

The Ninth Circuit rule fundamentally undermines that statutory scheme because it authorizes a tribe that lacks the land base necessary to invoke the "exclusive jurisdiction" provision in Section 1911(a) to *bypass* the "transfer" provision in Section 1911(b) and initiate a child custody proceeding *directly in tribal court*. That does three things (at least) that are directly at odds with the statute. First, it eliminates the checks that Congress imposed in Section 1911(b) before an action may be transferred to tribal court: the prior consent of the parents—which gives parents an "absolute veto power over transfers," Department of the Interior, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1979)—and a judicial determination that there is not "good cause" to prevent a transfer to tribal court. Second, it strips parents of the important procedural

protections guaranteed by the ICWA. And third, it puts the onus on non-consenting parents or the State to seek to transfer the case *out* of tribal court, which is inconsistent with the statutory premise that an off-reservation case will at least begin in *state* court. *See* App.15a (reasoning that a party who objects to tribal court jurisdiction may "file a case in state court").

Nothing in this Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), is to the contrary. In that case, the Court held that twin babies born to members of a tribe were domiciled on the reservation for purposes of ICWA § 1911(a) by virtue of the fact that their parents lived on the reservation. *Id.* at 37, 48. In reaching that decision, this Court observed in dicta that ICWA § 1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, *state-court proceedings* for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of 'good cause,' objection by either parent, or declination of jurisdiction by the tribal court." *Id.* at 36 (emphasis added). But neither that dictum nor Section 1911(b) itself *confers* any jurisdiction on tribes—concurrent or otherwise—beyond the authority to receive transfer cases from state courts in accordance with the "metes and bounds" set forth by Congress. *Lara*, 541 U.S. at 202.

Moreover, *Holyfield* could not have recognized any inherent tribal authority over nonmembers because both parents in that case were *tribal members* who lived *on* the reservation. 490 U.S. at 37. Likewise, the holding of the decision was that the Indian children (who were also members of the tribe) were domiciled on

the reservation as well. *Id.* at 48-49. Thus, nothing in *Holyfield* (or the ICWA) expands the inherent authority of tribes to initiate child custody proceedings involving a nonmember outside Indian country.[16]

The fact that the Ninth Circuit rule permits the hundreds of Indian tribes in Alaska to bypass the scheme carefully crafted by Congress in the ICWA after balancing the interests of children and parents, States, and tribes in Indian child custody proceedings weighs strongly in favor of granting certiorari.

III. THE ENORMOUS PRACTICAL IMPLICATIONS OF THE NINTH CIRCUIT RULE UNDERSCORE THE NEED FOR REVIEW

Ordinarily, the fact that a question is undeniably important and implicates a serious conflict of authority is sufficient to warrant the exercise of this Court's certiorari jurisdiction. *See* S. Ct. R. 10. In this case, however, several compelling practical considerations also counsel heavily in favor of certiorari.

1. *Race to initiate child custody proceedings.* By adopting a rule that permits tribes to circumvent the

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[16] Both the Ninth Circuit and the tribe have rested their far-reaching conception of tribal authority on the doctrine of *inherent* tribal sovereignty and not on any suggestion that the ICWA (or any other Act of Congress) actually *confers* such sovereignty. *See* App. 2a (concluding that the ICWA does not "*prevent*[] the Kaltag court from exercising [inherent] jurisdiction") (emphasis added); App. 57a (*Venetie I.R.A. Council*), Appellees' Br. 6 (9th Cir. Oct. 6, 2008) (arguing that Section 1911(b) "says absolutely nothing about a Tribe's original jurisdiction to hear child protection proceedings in the first instance"). But, as discussed, this conception of inherent tribal authority—one reaching off-reservation over nonmembers—is wholly unsupported by this Court's precedents.

ICWA's transfer provision and attendant checks (including the parental veto right) the decision below creates an enormous incentive for tribes to initiate child custody proceedings *before* a state court case is filed—thus triggering § 1911(b) and its checks on transfer. Once a child protection action is filed in tribal court, the tribe could exercise exclusive jurisdiction over the matter (as the tribe here did) and effectively strip the State of its *parens patriae* role in preserving and protecting the welfare of off-reservation Indian children. And since the ICWA does not grant States any right to intervene in tribal court proceedings (*cf.* 25 U.S.C. § 1911(c) (granting tribes the right to intervene in state court proceedings)), the State would lack a right to intervene to protect its interests—and, more to the point, the child's interests—in tribal court. Meanwhile, the State and nonmember parents in particular will be motivated to bring actions quickly in state court, in order to avoid this situation and secure the protections afforded by § 1911(b). Either way, the children stand to be the real losers—because the incentive to file first may cut short available efforts to resolve child custody matters *without* litigation.[17]

2. *Uncertain nature of tribal court proceedings.* The procedural protections afforded to parents in tribal courts may also be slight, particularly when compared

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[17] Where the child is born to parents of different tribes, there may even be a race *among* tribes to file first. Alaska is already aware of one such case to occur since the decision below, in which the Tribal Courts of Kaltag and Tanana both purported to assume jurisdiction and issue competing orders on the same day regarding custody over three children eligible for membership in both tribes—owing to their parents' membership in different villages.

to those required in state court proceedings subject to the ICWA. Indeed, in smaller villages, a tribe may even lack a court. By contrast, the ICWA guarantees indigent parents the right to court-appointed counsel in removal, placement, or termination proceedings. 25 U.S.C. § 1912(b). The ICWA also establishes important procedural safeguards on the termination of parental rights, including a "beyond a reasonable doubt" standard of proof. *See id.* § 1912(f). However, because the ICWA is intended "to establish minimum Federal standards and procedural safeguards in *State Indian child custody proceedings*," H.R. Rep. No. 95-1386, at 19, *as reprinted in* 1978 U.S.C.C.A.N. at 7541 (emphasis added), tribal courts need not—and often do not—provide those protections.[18]

Moreover, Alaska affords a number of additional procedural protections in child custody proceedings. First, Alaska's courts have long afforded even greater procedural protections to parents involved in child custody proceedings than is required by the federal Due Process Clause. *See, e.g.*, *In re K.L.J.*, 813 P.2d 276, 282 n.6 (Alaska 1991); *see also Flores v. Flores*, 698

[18] It is unclear what procedural protections were afforded to the parties in this case. For example, in discovery, when asked whether N.S.'s parents were given even "the ability to review the laws, codes, resolutions, and/or manuals concerning the operation of the Kaltag Tribal Court," respondents indicated only that "Kaltag tribal *members* have the ability to review "Tribal Court Development" and "Tribal Court Handbook." Kaltag Tribal Council and Hudson and Salina Sam's Responses and Objections to Defendants' Discovery Requests at 4 (D. Alaska Apr. 2, 2007) (emphasis added). Likewise, the Kaltag Constitution makes no provision for the procedures to be followed in Kaltag Tribal Court, or, for that matter, even the existence of the court. App. 79a-85a.

P.2d 893, 893-94 (Alaska 1979). Even Alaska Natives who voluntarily relinquish parental rights are "entitled to the appointment of an attorney if a hearing is requested ... to the same extent as if the parent's rights had not been terminated," in order to modify termination orders or even to reinstate parental rights. Alaska Stat. § 47.10.089(i). Likewise, courts may appoint attorneys to represent children's interests in custody hearings. *Id.* § 47.10.010(b). Tribes, meanwhile, are expressly provided notice of and the opportunity to challenge non-emergency transfers of child placement. *id.* § 47.10.030(s). And importantly, Alaska affords both children and their parents the right to appeal a judgment or order, *id.* § 47.10.080(i), something that Native Villages typically do not or as a practical matter cannot make available.[19]

3 *Geographic burdens for nonmembers.* Because tribal jurisdiction has no connection to the existence of a land base under the Ninth Circuit rule, the decision below also may impose hardships for parents who do

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[19] At least one study has raised questions about the evenhandedness of child custody proceedings in certain tribal courts in Alaska. *See* Lisa Rieger & Randy Kandel, *Child Welfare and Alaska Native Tribe Governance: A Pilot Project in Kake, Alaska*, at 3-4 (Oct. 1999) (noting that "not everyone ... was happy with the handling of cases and their consequences—in a community where everyone knows or thinks they know, who did what [t]o whom.... [M]embers of powerful families ... got off lightly [while] others—persons with bad reputations or members of families without political clout, are unjustly targeted"); *see also Nenana*, 722 P.2d at 222 (observing that "[s]ome of the [200-plus tribes in Alaska] already may have systems for dispute resolution in place capable of adjudicating custody matters in a reasonable and competent fashion; others, no doubt, do not").

not live in the vicinity of the tribal court initiating the proceeding. For example, under the Ninth Circuit rule, the Village of Kaltag could initiate Indian child custody proceedings involving a child or parent living more than 1000 miles away in Ketchikan. Indeed, given the immense size of Alaska and the fact that Native Villages are often separated by significant—often difficult-to-travel—distances, it may not be logistically or financially feasible for nonmember parents to attend such proceedings in person. And because a tribe may assume jurisdiction without a nonmember having ever set foot in the village—or Alaska, for that matter—a nonmember parent who lives outside the village exercising jurisdiction may be at a significant practical disadvantage. At least when the action is filed in the state courts—which are more accessible than many if not most tribal courts—a nonmember parent may object to a transfer to tribal court. 25 U.S.C. § 1911(b).

4. *Follow-on litigation over tribal court decrees.* As this case illustrates, the Ninth Circuit rule also will engender follow-on litigation over the validity of tribal court decrees. Because it is likely that nonmember parents who are dissatisfied with tribal court proceedings will choose to challenge the legitimacy of the tribal court's judgment, the decision below is likely to generate follow-on litigation in state and federal court over whether individual Native Village tribal court judgments are entitled to full faith and credit. Such litigation—which, for example, might focus on the adequacy of the procedures followed in tribal court—not only will generate friction between state and tribal courts, but could jeopardize the welfare of children by prolonging child custody disputes and undermine one of

the overriding purposes for passing the ICWA in the first place. *See* 25 U.S.C. § 1901(5).

5. *Spill over into new areas.* The Ninth Circuit's decision may invite new and even more expansive exercises of tribal authority. If—as the courts below held—"internal disputes of tribal members," App.17a, encompass any situation merely *involving* a tribal member, tribal jurisdiction could extend to nonmembers in cases such as inheritance, divorce, and child custody. Because the exercise of jurisdiction over the nonmembers in this case was also off-reservation, an element of geographic uncertainty exists. There is no reason for this Court to permit such a potentially destabilizing decision to stand—especially where it is flatly at odds with this Court's own precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

FILED
AUG 28 2009
MOLLY C. DWYER,
CLERK
U.S. COURT OF
APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KALTAG TRIBAL COUNCIL; HUDSON SAM; SALINA SAM, Plaintiffs – Appellees, v. KARLEEN JACKSON, in her official capacity as Commissioner of Alaska Department of Health and Social Services; BILL HOGAN, in his official capacity as Deputy Commissioner of Alaska Department of Health and Social Services; and PHILLIP MITCHELL, in his official capacity as Section Chief of the Alaska Bureau of Vital Statistics, Defendants – Appellants.	No. 08-35343 D.C. No. CV-06-211-TMB MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court for the District Court of Alaska

Timothy M. Burgess, District Judge, Presiding
Argued and Submitted August 5, 2009
Anchorage, Alaska

Before: FARRIS, THOMPSON and RAWLINSON, Circuit Judges.

Plaintiffs-Appellees Kaltag Tribal Council ("Kaltag"), Selina Sam and Hudson Sam (collectively, "Kaltag plaintiffs") filed this case in district court against Karleen Jackson, Bill Hogan, and Phillip Mitchell, employees of the State of Alaska, Department of Health and Human Services. The Kaltag plaintiffs alleged that an adoption judgment issued by the Kaltag court is entitled to full faith and credit under § 1911(d) of the Indian Child Welfare Act ("ICWA"), and that the Alaska employees were required to grant the request for a new birth certificate. The district court granted the Kaltag plaintiffs' motion for summary judgment and denied the Alaska employees' summary judgment motion. The Alaska employees appeal. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

The district court's decision that full faith and credit be given to the Kaltag court's adoption judgment is compelled by this circuit's binding precedent. *See Native Village of Venetie IRA Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991). The district court correctly found that neither the ICWA nor Public Law 280 prevented the Kaltag court from exercising jurisdiction. Reservation status is not a requirement of jurisdiction because "[a] Tribe's authority over its reservation or Indian country is incidental to its

authority over its members." *Venetie*, 944 F.2d at 559 n.12 (citations omitted).

The Eleventh Amendment does not bar the relief sought by the Kaltag plaintiffs. *Id.* at 552.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

KALTAG TRIBAL COUNCIL, and HUDSON AND SALINA SAM, Plaintiff, vs. KARLEEN JACKSON, et al., Defendants	Case No. 3:06-cv-211 TMB ORDER

I. MOTIONS PRESENTED

Plaintiff seeks summary judgment on all counts in the Amended Complaint. Defendants move for summary judgment of dismissal on all counts. Both motions have been fully briefed, and the Court heard oral argument on February 13, 2007. The Court being fully advised, now enters the following order.

II. BACKGROUND

N.S. was born on October 18, 1999. Her birth mother is a member of the Kaltag Tribe, a federally recognized tribe as defined by the Indian Child Welfare Act, ("ICWA").[1] Her birth father is from the Native Village of Koyukuk and is either a tribal member of Koyukuk or eligible for membership in that Tribe. N.S. is therefore an "Indian child" as defined in the Act.[2]

On September 3, 2000, a "Tribal Family Youth Specialist" ("Kaltag TFYS worker"), who is an employee of Plaintiff Kaltag Tribal Council ("Kaltag"),

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[1] 25 U.S.C. § 1903(8).

[2] 25 U.S.C. § 1903(4).

took emergency custody of N.S. due to her mother's inability to care for N.S. and a likelihood of physical injury. On September 6, 2000, the Kaltag court took temporary custody of N.S., and N.S. continued in the temporary custody of Kaltag court until July 29, 2004, when the Kaltag court terminated the parental rights of both parents, made N.S. a ward of the court, and granted permanent guardianship to Plaintiffs Hudson and Selina Sam, who had been N.S.'s foster parents since her placement with them on April 27, 2004.

In August of 2006, the Sams petitioned the Huslia Tribal Court to adopt N. S. and make her a permanent part of their family. Because N.S. is a member of the Kaltag Tribe, and the Kaltag Tribal Court had already exercised jurisdiction over N.S., the petition was forwarded to the Kaltag Tribal Court, which issued an Order of Adoption on November 17, 2006, declaring the Sams to be N.S.'s legal parents. In the same order, the tribal court ordered that N.S.'s name be changed to reflect that of her new parents, and that this name change shall be reflected on a new birth certificate from the State of Alaska, Bureau of Vital Statistics. The same day that the Order of Adoption was signed, the clerk of Kaltag Tribal Court signed and submitted a Report of Adoption to the Bureau of Vital Statistics requesting a new birth certificate for N.S.

On January 26, 2006, the Department of Health and Social Services, Bureau of Vital Statistics rejected the request. In a letter to the Kaltag Tribal Council, the Bureau explained:

> As of October 25, 2006, the Bureau will only be accepting Tribal Court granted adoption paperwork from the following 3 entities: Barrow, Chevak, and Metlakatla. All other

> tribal entities will need to submit the Cultural Adoption packet in order for the Bureau to process the adoption.

The letter also stated that a Cultural Adoption packet was enclosed with the letter, and explained that once it was completed and returned, along with some other missing information, the Bureau would continue processing the request.[3] The Bureau never received a completed Cultural Adoption packet from Kaltag regarding N.S.

The Kaltag Tribal Council and the Sams filed this case on September 8, 2006, alleging that adoption orders issued by the Kaltag court are entitled to full faith and credit under Subsection 1911(d) of the ICWA, and that the Bureau of Vital Statistics violated the subsection by not granting the request for an amended birth certificate. Plaintiffs seek a declaration that Kaltag court's adoption orders are entitled to full faith and credit, and an injunction requiring the Bureau to grant said status to the adoption order by issuing the Sams a substitute birth certificate.

III. STANDARD OF REVIEW

Summary judgment is appropriate where there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Where the material facts are not in dispute, the issue is one of law for the court and

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[3] According to the Defendants, copies of denial letters such as the one sent to the Kaltag Tribal Council are not retained by the State once a cultural adoption application is received, which makes it difficult to determine how many "cultural adoptions" approved by the State were the result of the State's refusal to accept a tribal court adoption decree.

summary judgment is therefore appropriate. The parties here agree that there are no factual disputes.

IV. DISCUSSION

Plaintiffs' motion for summary judgment requests a declaration that federally recognized tribes in Alaska possess concurrent jurisdiction with the State to adjudicate adoptions of their own tribal members, and that the State must therefore give full faith and credit to tribal adoption orders pursuant to § 1911(d) of the ICWA. In addition, the motion seeks a declaration that, since the tribal adoption decree of N. S. is entitled to full faith and credit under § 1911(d) of the ICWA, the Sams, as the adoptive parents, are entitled to have N.S.'s adoption order recognized and an amended birth certificate issued pursuant to 42 U.S.C. § 1983.

Defendants' Motion for Summary Judgment seeks dismissal of all counts of the complaint, arguing that the case is barred by the Eleventh Amendment of the United States Constitution, and alternatively that Kaltag does not have the authority to initiate child protection proceedings in tribal court in Alaska.

The Eleventh Amendment

Defendants, all employees of the State of Alaska, ask this Court to dismiss the action because the Plaintiffs are prohibited from bringing this lawsuit by the Eleventh Amendment of the United States Constitution, which provides that a state is immune from suit regarding claims for which it has not consented to be sued.

Eleventh Amendment immunity protects Alaska and its officials from suits except for "certain suits seeking declaratory and injunctive relief against state

officers in their individual capacities."[4] This limitation of sovereign immunity is known as the *Ex parte Young* doctrine.[5] Defendants argue that although the *Ex Parte Young* exception allows state officials to be sued for declaratory and injunctive relief, that exception is not available here because of the impact the suit has on the state's "special sovereign interests." Defendants argue that a state forum is available here, and that any federal interest in interpreting the ICWA is outweighed by the state's sovereignty interests implicated by this case.[6] Accordingly, argue Defendants, the Court should decline to apply the *Ex parte Young* exception to state sovereign immunity, and should dismiss the Complaint.

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[4] *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997) ("The Tribe's suit, accordingly, is barred by Idaho's Eleventh Amendment immunity unless it falls within the exception this Court has recognized for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities. *See Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).")

[5] *Edelman v Jordan*, 415 U.S. 651 (1974).

[6] Specifically, Defendants complain that granting the requested relief (declaration and injunction) would eliminate the state's exclusive jurisdiction, as set out in Section 1911 of the Act, to initiate child protection proceedings concerning Indian children of tribes, such as Kaltag, that are not on reservations or have not applied for exclusive jurisdiction. If, as the Plaintiffs claim, the state has to give full faith and credit to Kaltag's adoption orders arising from child protection proceedings that were initiated by Kaltag and not transferred from a state court proceeding, it would completely strip the state and its courts of its sovereign right to adjudicate matters concerning the birth family of the adopted child, since the state has no ability to intervene or transfer the action back to state court.

The Ninth Circuit held in *Native Village of Venetie I R A Council v. State of Alaska*,[7] ("*Venetie*"):

> [W]e agree with the district court—and Alaska does not seriously challenge this holding—that the eleventh amendment does not bar the plaintiffs' request for injunctive relief against the Commissioner of the Department of Health and Human Services.
>
> ... [D]eclaratory relief is not available if its sole efficacy would be as res judicata in a subsequent state court action for retroactive damages or restitution. However, such is not the case here. Not only has Alaska refused to recognize the native village tribal adoptions in the past, it continues to do so in the present, and will apparently continue to refuse recognition in the future. Thus, if this refusal is ultimately determined to be unlawful, the grant of declaratory relief can most properly be described as a mere case-management device that is ancillary to a judgment awarding valid prospective relief. The plaintiffs' request for declaratory relief is not barred by the eleventh amendment.[8]

Although Defendants argue that the *Venetie* case is not on point, it does provide guidance on this issue. The Eleventh Amendment bars any claims for retroactive relief.[9] It does not bar a request for injunctive relief against the Commissioner of the

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[7] 944 F.2d 548 (9th Cir. 1991).

[8] *Id.* at 552 (citations omitted).

[9] *Venetie*, 944 F.2d at 552.

Department of Health and Social Services.[10] If the Court determines that Defendants, as individuals, have violated federal law, injunctive relief would be appropriate. Regarding declaratory relief, the *Venetie* court noted that such relief "is not available if its sole efficacy would be as res judicata in a subsequent state court action for retroactive damages or restitution."[11] There is no indication that such is the case here. The only relief sought by Plaintiffs is a declaration that Kaltag court's adoption orders are entitled to full faith and credit, and an injunction requiring the Bureau to grant said status to the adoption order in this case by issuing the Sams a substitute birth certificate. No damages or restitution are sought.

Furthermore, the *Venetie* court specifically found that Congress intended to give Indian tribes access to federal courts to determine their rights and obligations under the ICWA.[12] "The Act includes an express congressional finding that state courts and agencies have often acted contrary to the interests of Indian tribes .... It would thus be ironic indeed if Congress then permitted only state courts, never believed by Congress to be the historical defenders of tribal interests, to determine the scope of tribal authority under the Act."[13] The Court finds that the Eleventh Amendment does not bar this suit.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 653

[13] *Id.* at 653-54, citing 25 U.S.C. § 1901(5)(1989)

The Indian Child Welfare Act ("ICWA")

It is undisputed that the state of Alaska must give full faith and credit to child custody determinations made by the tribal courts, if the tribal court properly exercised jurisdiction in the matter. The issue here is whether the tribal court had concurrent jurisdiction with the State to initiate a child protection matter.[14] Defendant argues that allowing tribes to initiate CINA-type cases outside of reservations and Indian country discounts the distinct differences in the parties' interests in such cases, and would radically recast the state/tribal jurisdictional balance already struck by Congress in their enactment of the ICWA. Plaintiffs argue that concurrent jurisdiction is intended and required under the ICWA. The portion of the ICWA pertaining to child custody proceedings reads as follows:

> **Indian tribe jurisdiction over Indian child custody proceedings**
>
> **(a) Exclusive jurisdiction**
>
> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

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[14] Also referred to by the parties as "Child in Need of Aid" or "CINA-type" cases.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.[15]

A "child custody proceeding" includes foster care placement, termination of parental rights, preadoptive

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[15] 25 U.S.C. § 1911

placement, and adoptive placement.[16] The ICWA includes Alaska natives within its definition of "Indians," and Alaska native villages are "Indian tribes" within the meaning of the Act.[17] Only one tribe in Alaska, the Metlakatla Indian Community, occupies a reservation, so the jurisdictional provision of § 1911(a) related to domicile is not applicable to the Kaltag tribe.

According to the plain language of the ICWA, a tribe shall have exclusive jurisdiction over child custody proceedings (foster care placement, termination of parental rights, preadoptive placement, and adoptive placement) where the child is living within the reservation, or where a child living outside of the reservation is a ward of the tribal court.[18] In contrast, a state court, handling a proceeding for the foster care placement of, or termination of parental rights to, an Indian child *not* domiciled or residing within the reservation of the Indian child's tribe, is required to transfer such proceeding to the jurisdiction of the tribe, in the absence of good cause to the contrary.[19]

In the plain language of § 1911, there is a grey area, which is the crux of this case: When a child is *not* domiciled or residing within a reservation, must the state court initiate child custody/protection proceedings or can such a proceeding originate in the tribal court? Plaintiffs suggest that the implication of

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[16] 25 U.S.C. § 1903

[17] 25 U.S.C. §§ 1903(3) & (8)

[18] § 1911(a)

[19] § 1911(b)

§ 1911 is that the tribal court has concurrent jurisdiction with the state court where an Indian child is not domiciled or residing on Indian land. Defendants' position is that tribes have only *transfer* jurisdiction in these circumstances, and that any case involving a child domiciled outside of Indian country must originate in state court, and be transferred to tribal court.

The United States Supreme Court has held that § 1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation ..."[20] The parties disagree as to the meaning of "concurrent jurisdiction." Defendants allege that concurrent jurisdiction does not mean that Alaska Native villages have "concurrent authority" to *initiate* child protection cases, but rather that the transfer jurisdiction is a concurrent jurisdiction *conditioned upon* parental consent and the absence of *good* cause to deny transfer. To find otherwise, argue Defendants, would cut off the state's ability to protect its interest in child welfare, and would make the veto power that parents have with respect to transfer to tribal courts meaningless. Defendants further argue that legislative history suggests that Congress intended to limit tribal authority under § 1911(b) to transfer only concurrent jurisdiction.

The Court finds Defendants' interpretation of § 1911(b) strained, in light of the United States Supreme Court's language in *Holyfield*. It would be incongruent for this Court to find that "presumptively tribal jurisdiction" requires the Tribe to first defer

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[20] *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989)

jurisdiction to the state court, and then wait for the state court to transfer the matter to tribal court.

Defendants also argue that the state's interest in protecting minor Alaska Native citizens would be entirely cut off if the tribal court could take jurisdiction first, and the interests of non-Native or non-member parents could be impaired by having to appear in a tribal court without the opportunity to object to that court. However, as Plaintiff explained at oral argument, any party that finds itself in tribal court against its wishes is always free to object to the tribal jurisdiction, call a state CINA officer, or file a case in state court.[21] Alaska state courts retain concurrent jurisdiction over all disputes arising within the State of Alaska, whether tribal or not.[22] "The only bar to state jurisdiction over Indians and Indian affairs is the presence of Indian country."[23]

Voluntary vs. Involuntary Child Custody Proceedings

Plaintiffs' position is that the substantive issues in this case already have been decided by the Ninth Circuit in *Venetie*. There, the Ninth Circuit addressed the issue "whether federal law requires the state of Alaska to accord 'full faith and credit' to child custody determinations made by the tribal courts of native villages,"[24] and concluded that it does so require.

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[21] Indeed, in this case the state CINA office was notified; however, what resulted from that notification is unclear.

[22] *John v. Baker*, 982 P.2d 738, 759 (Alaska 1999).

[23] *Id.*, citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

[24] *Venetie*, 844 F.2d at 550.

Defendants argue that the holding of *Venetie* should be limited to the facts in that case, and that the doctrine of collateral estoppel is not applicable because of the factual differences between the *Venetie* and the current case. Defendants distinguish *Venetie* arguing that it addressed strictly internal relations, such as a voluntary adoption among tribal members. The adoption in this case is not private nor voluntary, nor among members, nor did it originate as an adoption case.[25] Noting that one quarter of rural Alaskans do not have convenient access to state courts, Plaintiffs argue that drawing any line that would prevent Tribes from exercising jurisdiction over CINA-type cases would prevent them from assisting children when they are most at risk. Tribes closest to the situation in all of rural Alaska would be powerless to help children in their own villages at the most critical time.

Defendants' voluntary versus involuntary argument has previously been rejected by the Ninth Circuit. In *Doe v. Mann*, the Plaintiff's efforts to create a distinction between "involuntary" and "voluntary" proceedings in order to put her case outside of California's Public Law 280 jurisdiction were found unpersuasive and without statutory support.[26] The court examined the definition of "child custody proceeding" in the ICWA and concluded that it "definitely encompasses voluntary and involuntary

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[25] Alternatively, Defendants argue that this case involves unraised questions of law that should be reconsidered in light of legal developments since the *Venetie* decision. However, this Court is in no position to "reconsider" a valid Ninth Circuit decision.

[26] *Doe v. Mann*, 415 F.3d 1038, 1062 (9th Cir. 2005).

proceedings."[27] Ultimately the Court held that imposing a "dividing line between voluntary and involuntary finds no support in the statute."[28]

Tribal Membership

Defendants note that the Alaska Supreme Court has held that a "tribe only has subject matter jurisdiction over the internal disputes of *tribal members*."[29] Similarly, in *Venetie*, the Ninth Circuit noted in a footnote that "[a] tribe's authority over its reservation or Indian country is incidental to its authority over its members."[30] However, it is the membership of the child that is controlling, not the membership of the individual parents. "A tribe's inherent sovereignty to adjudicate internal domestic custody matters depends on the membership or eligibility for membership of the child. Such a focus on the tribal affiliation of the children is consistent with federal statutes such as the ICWA, which focuses on the child's tribal membership as a determining factor in allotting jurisdiction. Because the tribe only has subject matter jurisdiction over the internal disputes of tribal members, it has the authority to determine custody only of children who are members or eligible for membership."[31]

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[27] *Id.* The court found particularly persuasive the phrase "where the parent or Indian custodian cannot have the child returned upon demand," as evidence of the fact that the ICWA covers both voluntary and involuntary proceedings.

[28] *Id.* at 1064.

[29] *John*, 982 P.2d at 759.

[30] *Venetie*, 944 F.2d at 559 n. 2 (citation omitted).

[31] See *John*, 982 P.2d at 759-60 (internal footnote omitted).

Public Law 280 and 25 U.S.C. § 1918

The State's policy that it need not grant full faith and credit to Kaltag's Tribal Adoption Order has been justified by an October 2004 Attorney General opinion, which concluded that because Alaska is a Public Law 280 state, the State has exclusive jurisdiction over adoption proceedings and therefore Alaska Tribes must petition pursuant to 25 U.S.C. § 1918 to reassume jurisdiction. Defendants argue that since most Alaska Native villages lack a reservation, they cannot exercise § 1911(a) jurisdiction over child protection cases, and therefore all tribes must petition for jurisdiction under § 1918 of the ICWA.[32] In response, Plaintiffs argue that § 1918 is applicable only where tribes wish to have exclusive, rather than concurrent, jurisdiction over child custody proceedings. Plaintiffs are correct. In *Doe v. Mann*, the Ninth Circuit found that § 1918 was a mechanism provided by Congress to allow tribes in Public Law 280 states the opportunity to obtain *exclusive* jurisdiction over child custody proceedings.[33] The implication is that the tribes and the states otherwise shared concurrent jurisdiction.

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[32] 25 U.S.C. § 1918 reads in relevant part:

> "Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction."

[33] *Mann*, 416 F.3d at 1061-62.

In any event, despite the distinctions made by Defendants between the *Venetie* facts and the facts of this matter, the law remains the same: "resolving the jurisdictional ambiguities in favor of the villages, we hold that neither the Indian Child Welfare Act nor Public Law 280 prevents [the villages] from exercising concurrent jurisdiction [over their members' domestic relations]."[34]

V. CONCLUSION

While the Court is sensitive to the concerns expressed by the Defendants that the state will not be able to track child protection issues of Native children where a tribal court takes jurisdiction before the state does, the cases cited herein clearly control the outcome of this dispute. Furthermore, any grey area identified in § 1911 must be resolved in favor of the Tribe, as ambiguities are to be resolved to the benefit of Indians.[35] "[W]hen a question of tribal power arises, the relevant inquiry is whether any limitation exists to *prevent* the tribe from acting, not whether any authority exists to *permit* the tribe to act."[36]

Accordingly, Plaintiff's Motion for Summary Judgment at Docket 29 is GRANTED. Defendants' Motion for Summary Judgment at Docket 31 is DENIED. The Kaltag court's adoption orders are entitled to full faith and credit, and the Bureau shall grant said status to the adoption order by issuing the Sams a substitute birth certificate.

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[34] *Venetie*, 944 F.2d at 662.

[35] *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1986).

[36] *Venetie*, 944 F.2d at 666 (citing W. Canby, *American Indian Law* 71-72 (2d ed. 1988)).

Dated at Anchorage, Alaska, this 22nd day of February, 2008.

/s/ Timothy Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

KALTAG TRIBAL COURT
KALTAG, ALASKA

In the Matter of:	)
	)
N[redacted] S[redacted]	)
DOB 10/18/99	) Case No. 00-0611
	)
	) Tribal Court Phone
	) Number:
Minor Tribal Member	) (907) 534 2264

ORDER OF ADOPTION

This matter came before the Kaltag Tribal Court for hearing on October 14, 2005. Present at the hearing were Kaltag Tribal Court Judges Beverly Madros, Fred Alexie, Dawn Madros, and TFYS Eleanor Maillelle, and present telephonically was Hudson Sam and Selina Sam, Guardians of the child. Also present telephonically were Tanana Chiefs Conference (TCC) Social Worker, Marie Grant, and the TCC Tribal Court Facilitator, Sue Hollingsworth.

The Court **HEREBY FINDS**:

1. Hudson and Selina Sam, guardians, petitioned the Court for the adoption of N[redacted] S[redacted], and
2. Parental rights of the natural parents of the minor were terminated on July 29, 2004, and permanent legal guardianship was given to Hudson and Selina Sam; and
3. The adoption of the child is in the best interest of the child; and

4. The adoption of the child is in accord with the traditional and customary law of the Kaltag Tribe.

NOW THEREFORE BE IT ORDERED BY THE KALTAG TRIBAL COURT THAT:

1. The child shall be the child of Hudson Sam and Selina Sam (nee' Selina Anne Simon) for all legal purposes from this time forward, and
2. The child's name shall be N[redacted] Sam from this time forth and shall be reflected on the new birth certificate issued by the State of Alaska Bureau of Vital Statistics; and
3. The child shall the right to inherit from her natural parents unless they otherwise provide; and
4. A new birth certificate shall be requested of the State of Alaska reflecting this adoption.

DONE BY TRIBAL COURT ACTION THIS 14th DAY OF OCTOBER 2005.

s/ Fred W. Alexie
Presiding Tribal Court Judge

11/17/05
Date

ATTEST: s/ Eleanor Mailelle
Clerk

KALTAG TRIBAL COURT
KALTAG, ALASKA

In the Matter of:	)	
	)	
N[redacted] S[redacted]	)	
DOB 10/18/99	)	Case No. 00-0611
	)	
	)	Tribal Court Phone
	)	Number:
Minor Tribal Member(s)	)	(907) 534-2243

ORDER GRANTING PERMANENT GUARDIANSHIP

The Kaltag Tribal Court held a hearing on July 29, 2004 at 10:30 a.m. Present at the hearing were judges, Marion Esmailka, Madeline Solomon and Violet Burnham. Present at the hearing were C[redacted] S[redacted], mother. Hudson and Selina Sam, foster parents. Also present at the hearing was TFYS, Donna Esmailka. Present telephonically in Fairbanks was Sue Hollingsworth, TCC Tribal Court Facilitator and Mishal Gaede, Child Protection Coordinator. After considering all the evidence available, this Tribal Court finds that the welfare of the child, N[redacted] S[redacted], is endangered if temporary legal custody is not taken by the tribal court.

The Tribal Court HEREBY FINDS:

5. The mother of the child, C[redacted] S[redacted], is a Kaltag tribal member. Under the tribal constitution of Kaltag this child is a Kaltag tribal member under the jurisdiction of the Tribal Court and eligible to apply for enrollment, and

6 The mother of the child, C[redacted] S[redacted], was given written notice of this hearing and was present at this hearing. She got off the teleconference for awhile because she could not hear anything. Sue Hollingsworth called her back. She stated she did not know where her daughter was placed. She did not know she went back to Hualia. She said she had called the Tribal office several times and someone just hangs up on her; and

7 The father of this child, A[redacted] L[redacted], was given written and verbal notice of this hearing and was not present at this hearing; and

8 The foster parents of this child, Hudson and Selina Sam were given written notice of this hearing and was present at this hearing. The family has some issues but they want to keep her permanently. In their cultural belief they do not adopt children, they keep them until they are of age and then the child decides what path they want to go. Hudson's mom and dad raised a lot of children without adopting any of them. They let them keep their own birth name and belief. That is what they want with N[redacted], permanent guardianship. We love her and want to keep her, please consider their cultural belief. H[redacted] is very relaxed and comfortable with them. She calls them mom and dad, sometimes when around the grandchildren she calls them grandma and grandpa. She fits right into the family. She gets along with the community people likes to talk and she talks lots. She is not wetting the bed as much as she did before. She got sick one time, she had a urinary tract

infection. She brings joy into their life. She shares a room with their youngest daughter, Barbie. Question? How does she act in a structured environment? They enrolled her in the Head Start program when she first went to Husha. She really enjoyed going to school. She was pulling hair at first but they sat down and talked to her and she stopped. She goes to church when they get up early enough, she does good. They all love her, their whole family. Question/concern; The court assumed they wanted to adopt her? They didn't want to keep moving from home to home, it's to hard on her. Hudson said "we want her but its our cultural belief not to adopt children", and

9 Sue Hollingsworth, Tribal Court Facilitator, gave a brief description of the Adoption and Family Safety Act. She also explained to the court about guardianship and adoption options; and

10 Donna Esmailka, TFYS gave a brief report on the case. She looked into family contacts for permanency. The parents were supposed to give a list of potential placements. In previous hearings C[redacted] gave some family names. They were contacted but could not make a commitment. Donna called A[redacted] I[redacted] get a list of names from his side but he did not want his family involved and there was no TFYS in Koyukuk at the time. Donna spoke with A[redacted] the morning of the hearing, July 29, 2004, and he that he could not make it to the hearing. When asked if he had any suggestions to the permanent planning, he said no. At this

hearing the court will determine whether or not parental rights will be terminated and to move forward with the permanent planning.

The Tribal Court CONCLUDES:

11. This child is a child in need of aid and should be granted permanent guardianship; and

12. It is in the best interest of the child to place her in permanent subsidized guardianship with Hudson and Selina Sam; and

13. It is in the best interest of the child to terminate the parental rights of her parents, A[redacted] L[redacted] and G[redacted] S[redacted]; and

14. It is in the best interest of the child for the TFYS, Donna Esmailka, and the TCC Social Worker, Mishal Gaede, to secure funds for her if applicable.

The Tribal Court THEREFORE ORDERS:

15. The Kaltag Tribal Court takes temporary legal custody of the child, N[redacted] S[redacted] and makes her a ward of this court; and

16. The Tribal Court hereby terminates the parental rights of A[redacted] L[redacted] and G[redacted] S[redacted] and

17. The permanent guardianship of the child is granted to Hudson and Selina Sam with a subsidy for her financial care until N[redacted] S[redacted]'s eighteenth birthday or until she graduates from High School, during which time they shall exercise full powers of guardianship to make legal, financial, health and educational decisions for her.

DONE BY TRIBAL COURT ACTION THIS 29th DAY OF JULY, 2004.

s/ Violet Burnham
Presiding Judge

KALTAG TRIBAL COURT
KALTAG, ALASKA

In the Matter of:	)	
	)	
N[redacted] S[redacted]	)	
DOB 10/18/99	)	Case No. 00-0611
	)	
	)	Tribal Court Phone
	)	Number:
Minor Tribal Member(s)	)	(907) 534-2243

ORDER AMENDING TEMPORARY CUSTODY

The Kaltag Tribal Council, exercising its authority as a tribal court, held a review in this case and amended the Order Granting Temporary Custody dated March 22, 2004 as follows:

The Tribal Court THEREFORE ORDERS:

18 The Kaltag Tribal Court takes temporary custody of the child, N[redacted] S[redacted], and makes her a ward of this court; and

19 The physical custody of the child is temporarily granted to Hudson and Selina Sam in Huslia Alaska

All other condition set forth within the Orders dated August 21, 2003 shall remain valid and in full effect until the next scheduled hearing.

s/ Madeline Solomon
Presiding Judge

4-22-04
Date

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF VENETIE I.R.A. COUNCIL; Native Village of Fort Yukon I.R.A. Council; Nancy Joseph; Margaret Solomon, Plaintiffs-Appellants,

v.

STATE OF ALASKA; Myra Munson, in her official capacity as Commissioner of the Department of Health and Social Services, Defendants-Appellees.

No. 88-3929.

Argued and Submitted Aug. 9, 1989.
Submission Vacated Aug. 10, 1989.
Resubmitted May 8, 1990.
Opinion Nov. 6, 1990.
Opinion Withdrawn Sept. 12, 1991.
Decided Sept. 12, 1991.

944 F.2d 548

Appeal from the United States District Court for the District of Alaska.

Before O'SCANNLAIN, LEAVY and TROTT, Circuit Judges.

ORDER

The opinion reported at 918 F.2d 797 (9th Cir.1990) is hereby withdrawn, and the attached opinion filed in

its stead. With this amended opinion, the plaintiffs-appellants' petition for rehearing is denied.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether federal law requires the state of Alaska to accord "full faith and credit" to child-custody determinations made by the tribal courts of native villages.

I

The native villages of Venetie and Fort Yukon lie on or above the Arctic Circle in Alaska's frozen tundra. Venetie has a population of 132, according to the 1980 census, all but three of whom are native. Five hundred and eighty-six people reside in Fort Yukon; 442 are native.

The native villages are organized under the Indian Reorganization Act ("I.R.A."). *See* 25 U.S.C. § 476 (1988). The villages' I.R.A. councils, two of the plaintiffs in this action, are the duly organized and elected governing bodies of the native villages.

Plaintiff Margaret Solomon is an Athabascan Indian from the Native Village of Fort Yukon. In the fall of 1985, Solomon was asked whether she would adopt a child born on September 28, 1985. She went to Fairbanks to pick up the infant, then eight days old. On May 27, 1986, the tribal court of the Native Village of Fort Yukon purported to formalize the adoption. Subsequently, in October 1986, Alaska denied Solomon benefits under the Aid to Families with Dependent Children program. State welfare officials informed Solomon that the state would not recognize the purported adoption and that the child was therefore not eligible for AFDC benefits.

Nancy Joseph is also an Athabascan Indian from the Native Village of Fort Yukon. One of Joseph's relatives, an expectant mother, asked Joseph to adopt the baby following the child's birth. Joseph agreed, and took the child home from the hospital shortly after his birth on February 24, 1986.

As the child's natural mother was from Venetie, she consented to the adoption in the tribal court of the Native Village of Venetie. Joseph subsequently requested a substitute birth certificate showing her to be the child's mother. However, the Bureau of Vital Statistics of the state of Alaska denied the request, observing that the Bureau "does not give recognition to native or tribal council adoption orders at this time."[1]

In June 1986, Joseph was laid off her job at the University of Alaska. After she had exhausted her unemployment benefits, she applied for AFDC benefits. On October 20, 1986, the Division of Public Assistance denied Joseph's application, informing her that "the courts have not recognized the Tribal adoption of the child. You should reapply when you can prove that you are the mother of the child."[2]

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[1] Letter from Patricia A. Lee, Supervisor, Special Services Unit, Bureau of Vital Statistics, State of Alaska Department of Health and Social Services, to Michael J. Stancampiano, Bureau of Indian Affairs, June 19, 1986. *See Native Village of Venetie v. Alaska*, No. CV F86-76 AJK (D.Alaska), Complaint (Nov. 21, 1986), Exhibit 2. Subsequent references to the record are to this case name and number.

[2] Letter from Patricia Donovan, Division of Public Assistance, State of Alaska, to Nancy L. Joseph, Oct. 20, 1986. *See* Complaint (Nov. 21, 1986), Exhibit 6.

Ms. Joseph, Ms. Solomon, the Native Village of Venetie I.R.A. Council, and the Native Village of Fort Yukon I.R.A. Council brought this suit in the United States District Court for the District of Alaska. They sought to enjoin the state of Alaska and certain of its officials from refusing to recognize the tribal court adoptions.[3] The plaintiffs asserted that under the Indian Child Welfare Act of 1978 ("Act"), 25 U.S.C. §§ 1901-1963 (1988), Alaska was required to give full faith and credit to the native-village adoption decrees. *See id.* § 1911(d). Both the plaintiffs and defendants moved for summary judgment. In a thorough and comprehensive opinion, the district court dismissed the plaintiffs' claims. *See Native Village of Venetie I.R.A. Council v. State of Alaska*, 687 F.Supp. 1380 (D.Alaska 1988). This timely appeal followed.

II

We first consider whether the district court had jurisdiction to hear the plaintiffs' grievances.

A

Since our jurisdiction is limited, we must determine whether federal courts have been empowered to hear this controversy. We begin with the claims of the native village plaintiffs. Congress has granted to federal district courts "original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362 (1988). The parties do not disagree that the "matter in controversy" here arises under the federal Indian Child Welfare Act. Rather, it

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[3] The plaintiffs also sought declaratory relief.

is disputed whether the native villages are a "tribe or band" for purposes of this section.

We recently identified two factors which a court may consider to determine whether an Indian group is such a "tribe or band" with a "duly recognized" governing body within the meaning of section 1362. (1) whether the Indian group has a governing body approved by the Secretary of the Interior under regulations issued pursuant to 25 U.S.C. § 476, or (2) whether the Indian group is a group or village listed as a native village in the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(b)(1). *See Native Village of Noatak v. Hoffman*, 896 F.2d 1157, 1160 (9th Cir.1990), *rev'd on other grounds sub nom Blatchford v. Native Village of Noatak*, — U.S. —, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991). The native villages of Venetie and Fort Yukon satisfy both criteria. *See, e.g.*, 43 U.S.C. § 1610(b)(1) (1982). Accordingly, they properly invoked federal jurisdiction under section 1362.

As to the individual plaintiffs, Joseph and Solomon, the district court had jurisdiction over their claims under 28 U.S.C. § 1331. In *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir.1983), *cert. denied*, 467 U.S. 1214, 104 S.Ct. 2655, 81 L.Ed.2d 862 (1984), we held that an action which raised "the issue of tribal sovereign powers," even if raised by an individual rather than a tribe, was "a sufficient federal question ... upon which to base § 1331 jurisdiction." *Id.* at 1321. Joseph's and Solomon's claims, as well as those of the native villages, raise the issue of the inherent tribal sovereignty of the native villages. As such, the district court possessed jurisdiction over these claims under section 1331.

B

Alaska argues that the plaintiffs' suit is barred by the eleventh amendment. The plaintiffs' claims are barred by the eleventh amendment to the extent that retroactive relief is sought. *See Blatchford v. Native Village of Noatak*, — U.S. —, 111 S.Ct. 2578, 2586, 115 L.Ed.2d 686 (1991), *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 425, 88 L.Ed.2d 371 (1985). Nonetheless, we agree with the district court—and Alaska does not seriously challenge this holding—that the eleventh amendment does not bar the plaintiffs' request for injunctive relief against the Commissioner of the Department of Health and Social Services. *See Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Whether the plaintiffs' request for declaratory relief survive eleventh amendment scrutiny is less clear. In *Green v. Mansour*, the Supreme Court concluded that declaratory relief is impermissible where such relief would "have much the same effect as a full-fledged award of damages or restitution by the federal court," the very type of relief forbidden by the eleventh amendment. 474 U.S. at 73, 106 S.Ct. at 428. Put another way, declaratory relief is not available if its sole efficacy would be as res judicata in a subsequent state court action for retroactive damages or restitution. *Id.* at 72-73, 106 S.Ct. at 427-28. However, such is not the case here. Not only has Alaska refused to recognize the native village tribal court adoptions in the past, it continues to do so in the present, and will apparently continue to refuse recognition in the future. Thus, if this refusal is ultimately determined to be unlawful, the grant of declaratory relief can most properly be described as "a

mere case-management device that is ancillary to a judgment awarding valid prospective relief." *Id.* at 71, 106 S.Ct. at 427. The plaintiffs' request for declaratory relief is not barred by the eleventh amendment.

C

Alaska argues that the plaintiffs have not alleged any federal causes of action. Specifically, it urges that statutory "full faith and credit" clauses, such as that contained in the Indian Child Welfare Act, do not automatically give rise to a federal cause of action. Alaska does not specifically challenge plaintiffs' other causes of action. However, since the failure to state a federal cause of action necessarily implicates this court's subject-matter jurisdiction, *see Ellis v. Cassidy*, 625 F.2d 227, 229 (9th Cir.1980), we consider *nostra sponte* each alleged cause of action.

Again, we begin with the native villages' causes of action. The plaintiffs allege that the defendants' actions deprived the native villages of rights secured under the "federally-protected inherent right of self-governance." Complaint ¶ 17. In *Noatak*, we held that Noatak had properly invoked federal subject-matter jurisdiction by alleging that "the Commissioner [of the Department of Community and Regional Affairs of the State of Alaska] violated federal laws and policies intended to further tribal self-government." 896 F.2d at 1165; *see also Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1474-75 (9th Cir.1989) (Alaska native village's allegations of sovereign power, as a "matter of federal statute and 'reserved powers,'" was a cognizable question under federal common law). Therefore, the native villages have alleged a valid cause of action.

The villages may not be able to obtain the particular relief they desire under this cause of action, however, if Congress specifically intended that a federal cause of action not accrue under the Indian Child Welfare Act's full faith and credit clause. A specific congressional directive would trump the general rule. *Cf Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524, 109 S.Ct. 1981, 1992, 104 L.Ed.2d 557 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule."). Thus, if Congress did not intend to permit tribes to sue in federal court to determine their rights under the Act's full faith and credit clause, such a restriction would prevent tribes from obtaining relief under the cause of action based on the right of self-governance.

As authority for its contention that no right of action exists under the Act's full faith and credit clause, Alaska cites the Supreme Court's recent decision in *Thompson v. Thompson*, 484 U.S. 174, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988). There the Court held that the full faith and credit clause of the Parental Kidnapping Prevention Act of 1980, *see* 28 U.S.C. § 1738A (1988), does not give rise to a cause of action in favor of the individual litigants in a custody dispute. *See Thompson*, 484 U.S. at 187, 108 S.Ct. at 520. Alaska errs, however, in seeking to impose upon Indian law doctrines from other fields of law. Because of the unique legal status of Indians in American jurisprudence, legal doctrines often must be viewed from a different perspective from that which would obtain in other areas of the law. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980) ("The unique historical origins of tribal sovereignty make it

generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law."). Moreover, "standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985). Rather, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 1258, 84 L.Ed.2d 169 (1985). Statutes are to be construed liberally in favor of the Indians; ambiguous provisions are to be interpreted to the Indians' benefit. *Blackfeet Tribe*, 471 U.S. at 766, 105 S.Ct. at 2403.

With the foregoing principles of Indian law in mind, we see no reason that Congress would not have intended to give Indian tribes access to federal courts to determine their rights and obligations under the Indian Child Welfare Act. The Act includes an express congressional finding that state courts and agencies have often acted contrary to the interests of Indian tribes:

> Congress finds ... that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901(5) (1988). It would thus be ironic indeed if Congress then permitted only state courts, never believed by Congress to be the historical

defenders of tribal interests, to determine the scope of tribal authority under the Act.

In addition, Congress's intention to create a tribal cause of action under the Act can be inferred from Congress's understanding of the law at the time the Act was enacted. The intention of Congress can be gleaned, at least in part, by reference to prior law, as Congress is presumed to be knowledgeable about existing law pertinent to any new legislation it enacts. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85, 108 S.Ct. 1704, 1711-12, 100 L.Ed.2d 158 (1988). Thus, Congress can be presumed to know that statutes passed for the benefit of Indian tribes will be liberally construed in favor of such tribes. *See, e.g., United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 687 (9th Cir.1976); *Pence v. Kleppe*, 529 F.2d 135, 140 (9th Cir.1976); *Holt v. Commissioner*, 364 F.2d 38, 40 (8th Cir.1966), *cert. denied*, 386 U.S. 931, 87 S.Ct. 952, 17 L.Ed.2d 805 (1967). Congress can also be presumed to know that the federal courts routinely resolve questions of tribal sovereignty as they are implicated by various acts of Congress. *See, e.g., Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 376-79 (1st Cir.1975) (Passamaquoddy Tribe was "tribe" within meaning of Nonintercourse Act, 25 U.S.C. § 177); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1236-37 (4th Cir.1974) (establishing impact of Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341, on tribal sovereignty). If Congress did not seek to have such principles applied to the interpretation of the Indian Child Welfare Act, we presume that it would have said so. Thus we must conclude that the villages may seek determination of their rights under the Act in federal court.

As to Joseph's and Solomon's individual causes of action under the Indian Child Welfare Act, the same reasoning applies. The Act's full faith and credit clause does not restrict its rights to tribes. *See* 25 U.S.C. § 1911(d) (1988). Indeed, promotion of the stability of Indian families is a major objective of the Act. *See* 25 U.S.C. § 1902 (1988) ("[t]he Congress hereby declares that it is the policy of this nation ... to promote the stability and security of Indian tribes *and families*") (emphasis added); 25 U.S.C. § 1901(4) (1988) ("Congress finds ... that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies"). Without a cause of action under the Indian Child Welfare Act, Joseph and Solomon would be essentially left without a remedy. We cannot conceive that Congress intended such a self-defeating result.[4]

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[4] We note that even if the reasoning of *Thompson v. Thompson*, 484 U.S. 174, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988), were somehow relevant here, we would nonetheless be compelled to reach the same result. The Supreme Court observed that one of the chief purposes behind the Parental Kidnapping Prevention Act's full faith and credit provision was to "avoid jurisdictional competition and conflict between State courts." *Id.* at 177, 108 S.Ct. at 515 (quoting Pub.L. 96-611, 94 Stat. 3569, § 7(c)(5), note following 28 U.S.C. § 1738A). Accordingly, the provision was appropriately described as merely "a rule of decision *for* courts to use in adjudicating custody disputes." *Id.* at 183, 108 S.Ct. at 518. The Indian Child Welfare Act, on the other hand, involves more than mere jurisdictional determinations; it provides *substantive* concerns that a court *must* consider when making Indian child custody determinations. It follows, then, that a federal court may intervene when a state expressly refuses to abide by these substantive mandates.

As their final cause of action, the plaintiffs have alleged that Alaska's actions deprived them of their constitutional rights of substantive due process and freedom of association. *See* Complaint ¶ 17. The district court did not address these allegations in its order granting summary judgment. Absent an initial review of these claims by the district court, we decline to express an opinion as to their merit in any respect.[6]

III

Our jurisdiction thus established, we turn to the substantive issues implicated in this action.[6]

Congress enacted the Indian Child Welfare Act in 1978 pursuant to the national policy "to protect the best interests of Indian children and to promote the stability and security of Indian tribes." 25 U.S.C. § 1902 (1988). To promote this policy, Congress established in the Act "minimum Federal standards for the removal of Indian children from their families" and sought to ensure "the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." *Id.*[7]

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[6] Because the district court properly exercised jurisdiction over this action and because its entry of summary judgment is a final order, we have jurisdiction over the appeal under 28 U.S.C. § 1291. *See Moran v. Aetna Life Ins. Co.*, 872 F.2d 296, 298 (1989).

[6] We review *de novo* the grant or denial of summary judgment. *See Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278, 279 (9th Cir. 1989).

[7] Congress was motivated to act after it became dissatisfied with the then-existing situation for the adoption of Indian children. *See* 25 U.S.C. § 1901(4) (1988) (declaring congressional finding "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an

As the primary mechanism for advancing its objectives in the Act, Congress created a comprehensive jurisdictional scheme for the resolution of custody disputes involving Indian children. This scheme expanded the role of tribal courts and correspondingly decreased the scope of state court jurisdiction. Indeed, state courts are powerless to resolve child-custody disputes concerning Indian children who reside on their tribal reservations; jurisdiction is exclusive in the tribe. *See id.* § 1911(a). In the case of Indian children who do not reside or are not domiciled on their tribe's reservation, state courts may exercise jurisdiction concurrent with tribal courts. However, the state court must refer the dispute to the appropriate tribal court unless good cause is shown for the retention of state court jurisdiction. *See id.* § 1911(b); *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 35, 109 S.Ct. 1597, 1601, 104 L.Ed.2d 29 (1989) ("Section 1911(b) ... creates concurrent but presumptively tribal jurisdiction in the

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alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions"); *id.* § 1901(5) (declaring congressional finding "that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families"). *See generally* Note, *Voluntary Adoptions Under the Indian Child Welfare Act of 1978: Balancing the Interests of Children, Families, and Tribes*, 63 S.Cal.L.Rev. 213, 214 (1989) (observing that the Act was enacted to "stem the flow of Indian children away from their natural families and tribes by establishing a jurisdictional, procedural, and substantive legal structure that recognizes tribal interests as well as the interests of the Indian children and their families in child custody proceedings").

case of children not domiciled on the reservation ...") Most importantly, whether such tribal jurisdiction is concurrent with or exclusive of state jurisdiction, all courts in the United States must give full faith and credit to the child custody determinations of tribal courts to the same extent that full faith and credit are given to the decisions of any other entity. *See* 25 U.S.C. § 1911(d) (1988).

For some tribes, the exclusive and referral jurisdiction provisions of sections 1911(a) and (b) became effective automatically following the enactment of the Act. However, tribes located within so called Public Law 280 states,[8] which include Alaska, can invoke such jurisdiction only after petitioning the Secretary of the Interior. *See id.* § 1918(a). Upon receipt of a proper petition, the Secretary has several options. He may grant the tribe exclusive jurisdiction over the entire reservation as provided in section 1911(a), allow the tribe to exercise exclusive jurisdiction only over limited community or geographic areas, or permit the tribe to exercise only referral jurisdiction pursuant to section 1911(b). *See id.* § 1918(b)(2).

The Indian Child Welfare Act includes Alaska natives within its definition of "Indians." *See id.* § 1903(3). Similarly, Alaska native villages are "Indian tribes" within the meaning of the Act. *See id.* § 1903(8); 43 U.S.C. § 1602(c) (1982). The parties agree that Venetie and Fort Yukon come within the meaning of

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[8] Broadly put, Public Law 280 gave to certain enumerated states concurrent jurisdiction over criminal and civil matters involving Indians, where jurisdiction had previously vested only in federal and tribal courts. *See infra* p. 561.

"Alaska Native Village" as defined by this Act. Similarly, both Ms. Joseph and Ms. Solomon are members of such an Alaska Native Village. Alaska, however, is a Public Law 280 state. Accordingly, the state contends that these native villages cannot exercise *any* child-custody jurisdiction unless and until they apply to the Secretary of the Interior and receive his approval as described above. The villages, on the other hand, maintain that they have, at the very least, concurrent jurisdiction by virtue of their inherent sovereignty.

In order to resolve this dispute, we must confront two issues. First, we must inquire whether the native villages are inherently sovereign, at least insofar as domestic relations or child-custody issues are concerned. Second, if such villages are possessed of such sovereignty, we must determine whether Congress has stripped the villages of that aspect of sovereign authority which encompasses child-custody determinations. We address each question in turn.

IV

The native villages of Venetie and Fort Yukon contend that they are sovereigns. Indeed, they argue that they are possessed of the same sovereignty as are Indian tribes in the lower forty-eight states. To address this contention, we must examine why Indian tribes in the continental United States are recognized as sovereign. If the rationales for sovereignty of such Indian tribes are equally applicable to Alaskan native villages, then we must conclude that they, too, are sovereigns.

"Indian tribes consistently have been recognized ... as 'distinct, independent political communities' qualified to exercise powers of self-government, not by

virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." F. Cohen, *Handbook of Federal Indian Law* 232 (1982 ed.) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559, 8 L.Ed. 483 (1832)). This is the view taken by the Supreme Court:

> The powers of Indian tribes are, in general, inherent powers of a limited sovereignty which has never been extinguished. Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.

United States v. Wheeler, 435 U.S. 313, 322-23, 98 S.Ct. 1079, 1085-86, 55 L.Ed.2d 303 (1978) (citations, quotations, and emphasis omitted). In short, Indian tribes are currently recognized as sovereign because they were, in fact, sovereign before the arrival of non-natives on this continent.

The practical result of this doctrine is that an Indian tribe need not wait for an affirmative grant of authority from Congress in order to exercise dominion over its members. *See Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 1257, 67 L.Ed.2d 493 (1981) ("the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members"); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152, 100 S.Ct. 2069, 2080, 65 L.Ed.2d 10 (1980) ("[t]he power to tax ... is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary

implication of their dependent status"). Sovereign authority is presumed until Congress affirmatively acts to take such authority away. *See, e.g., Wheeler*, 435 U.S. at 323, 98 S.Ct. at 1086 ("until Congress acts, the tribes retain their existing sovereign powers"). One noted commentator (a distinguished member of this Court) explains: "The point to be emphasized is that when a question of tribal power arises, the relevant inquiry is whether any limitation exists to *prevent* the tribe from acting, not whether any authority exists to *permit* the tribe to act." W. Canby, *American Indian Law* 71-72 (2d ed. 1988) (emphasis in original).[9]

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[9] In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), the Court suggested that the doctrine of inherent tribal sovereignty might be giving way to the doctrine of federal preemption as the sole basis for limiting state jurisdiction over Indian tribes. *See id.* at 172, 93 S.Ct. at 1262 ("[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption"). Drawing on *McClanahan*, Alaska contends that the native villages cannot successfully invoke inherent sovereignty as a bar to the state's jurisdiction. However, subsequent decisions by the Supreme Court make it clear that the doctrine of inherent sovereignty remains an independent barrier to state jurisdiction over tribal affairs. In *White Mountain Apache Tribe*, the Court explained:

> [C]ongressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them. *The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to*

In accordance with this doctrine of inherent tribal sovereignty, it follows that the Indian groups to be recognized as sovereigns should be those entities which historically acted as bodies politic, particularly in the periods prior to their subjugation by non-natives. There is, however, an additional prerequisite that an Indian group must meet in order to achieve present-day recognition as a sovereign: the modern-day group must demonstrate some relationship with or connection to the historical entity. *See United States v. State of Washington*, 641 F.2d 1368, 1372-73 (9th Cir.1981), *cert. denied*, 464 U.S. 1143, 102 S.Ct. 1001, 71 L.Ed.2d 294 (1982); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 585-87 (1st Cir.), *cert. denied*, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979). In *United States v. State of Washington*, we held that in order for a group of Indians to enjoy the benefits of a treaty between the federal government and the tribe from which the Indians descended, the "group [of Indians] must have maintained an organized tribal structure." *State of Washington*, 641 F.2d at 1372. "[T]ribal status is preserved," we held, "if some defining characteristic of the original tribe persists in an evolving tribal community." *Id.* at 1372-73.

This requirement has been interpreted liberally in favor of Indian groups. "[C]hanges in tribal policy and organization attributable to adaptation do not destroy tribal status." *Id.* at 1373. We have been particularly

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activity undertaken on the reservation or by tribal members.

448 U.S. at 142-43, 100 S.Ct. at 2583-84 (emphasis added, citations and quotation omitted). Thus, we reject Alaska's contention that inherent sovereignty cannot be looked to as a bar to state jurisdiction.

sympathetic to changes wrought as a result of dominion by non-natives. *See id.*; *see also Mashpee Tribe*, 592 F.2d at 586 ("if a group of Indians has a set of legal rights by virtue of its status as a tribe, then it ought not to lose those rights absent a *voluntary decision* made by the tribe") (emphasis added). In general, we have continued to recognize tribal existence unless the tribe has voluntarily sought, and achieved, assimilation into non-Indian culture. *See State of Washington*, 641 F.2d at 1373 ("When assimilation is complete, those of the group purporting to be the tribe cannot claim tribal rights"); *Mashpee Tribe*, 592 F.2d at 587 ("If all or nearly all members of a tribe chose to abandon the tribe, then, it follows, the tribe would disappear.") In sum, a relationship between the modern-day entity seeking tribal status and the Indian group of old must be established, but some connection beyond total assimilation is generally sufficient.[10]

With these fundamental concepts in mind, we turn to Alaska. Following the United States' purchase of Alaska in 1867, Congress paid little heed to the region's natives and was content to leave their legal status unresolved. The courts, however, could not escape the issue so easily.[11] In a series of cases, Judge Matthew

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[10] The Secretary of the Interior has promulgated regulations setting forth certain criteria which Indian groups in the continental United States must satisfy in order to achieve "tribal" status. *See* 25 C.F.R. § 83 (1989). These regulations essentially mirror the factors set forth above—historical origins and continuity. *See id.* § 83.7(a)-(c).

[11] *See generally* Harring, *The Incorporation of Alaskan Natives Under American Law: United States and Tlingit Sovereignty, 1867-1900*, 31 Ariz. L. Rev. 279, 283-84 (1989).

Deady, a federal district judge with chambers in the Pioneer Courthouse in Portland, Oregon, but occasionally sitting on the circuit court with jurisdiction extending to Alaska, held that Alaska was not "Indian country" for purposes of either the Indian Intercourse Act or the Revised Statutes of the United States. *See United States v. Seveloff*, 27 F.Cas. 1021, 1022 (D.Or.1872) (No. 16,252); *Waters v. Campbell*, 29 F. Cas. 411, 411-12 (C.C.D.Or.1876) (No. 17,264); *Kie v. United States*, 27 F. 351, 362-65 (C.C.D.Or.1886). Ultimately, a newly-created federal district court for Alaska expanded Judge Deady's view and declared that Alaska native groups were not independent sovereigns. The Alaska district court concluded that "[t]he United States has at no time recognized any tribal independence or relations among these Indians, ... [and that] they have been and now are regarded as dependent subjects." *In re Sah Quah*, 31 F. 327, 329 (D.Alaska 1886); *see also id.* ("their system is essentially patriarchal, and not tribal!").

As a result of these decisions, Alaska natives were treated as divorced from the rules of Indian law which applied to lower forty-eight tribes. *See Native Village of Venetie*, 687 F.Supp. at 1393 ("The law of aboriginal peoples in Alaska has remained distinct from Indian law for the continental United States, because of the different historical path taken in Alaska."); Harring, *supra*, at 283 n. 103 ("The cumulative effect of Deady's opinions was to deprive Alaska natives of the same right to sovereignty over their political affairs that Indians in the rest of the United States had.") The district court in the case at bar believed that a partial reconciliation had occurred. "Since *Sah Quah*, Alaska

has been partially assimilated to the national body of Indian law." 687 F.Supp. at 1398.

The district court erred, however, in believing that reconciliation was even necessary. Judge Deady's superannuated views of tribal sovereignty notwithstanding, such notions are not the law of the land today. Rather, if native groups in Alaska were sovereign prior to the incorporation of the land mass into the United States, they could lose their sovereignty only by express act of Congress or assimilation by the natives into non-native culture.

Indian sovereignty flows from the historical roots of the Indian tribe. *See Wheeler*, 435 U.S. at 322-23, 98 S.Ct. at 1085-86. Tribal sovereignty exists unless and until affirmatively divested by Congress. *See id.* at 323, 98 S.Ct. at 1086. Thus, to the extent that Alaska's natives formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare, we perceive no reason why they, too, should not be recognized as having been sovereign entities.[12] If the native villages of Venetie

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[12] One commentator has suggested that Alaskan native villages should not be considered sovereigns because of unresolved questions concerning whether such villages occupy "Indian country." *See* Comment, *Alaskan Native Indian Villages: The Question of Sovereign Rights*, 28 Santa Clara L.Rev. 875 (1988). *But see* Note, *The Uncertain Legal Status of Alaskan Natives After* Native Village of Stevens v. Alaska Management & Planning: *Exposing the Fallacious Distinctions Between Alaska Natives and Lower 48 Indians*, 31 Ariz.L.Rev. 405, 419-21 (1989) ("[T]he federal government created reservations to 'forestall white Indian conflicts over lands,' not to recognize the sovereignty of indigenous groups.") (quoting F. Cohen, *Handbook of Federal Indian Law* 743 (1982 ed.)). However, tribal sovereignty is not coterminous with Indian country. *Cf.* 25 C.F.R. § 83.7(b) (1989) (in

and Fort Yukon are the modern-day successors to sovereign historical bands of natives, the villages are to be afforded the same rights and responsibilities as are sovereign bands of native Americans in the continental United States.

We cannot say on this record, however, whether the predecessors of the native villages of Venetie or Fort Yukon formed such bodies politic. Nor can we say whether Venetie or Fort Yukon can sufficiently trace their origins to such an identifiable historical sovereign that it should be considered the modern day successor

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order to achieve federal recognition, a group of Indians need not inhabit formal "Indian country", inhabitation of "a specific area" or a "community viewed as American Indian" is sufficient). Rather, tribal sovereignty is manifested primarily over the tribe's members. *See Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 2060, 109 L.Ed.2d 693 (1990) ("the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order [and] ... to prescribe and enforce rules of conduct for [their] own members"); *Wheeler*, 435 U.S. at 326, 98 S.Ct. at 1087 (powers such as enforcement of internal criminal laws "involve only the relations among members of a tribe [and t]hus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status"). A tribe's authority over its reservation or Indian country is incidental to its authority over its members. *Cf. Duro*, 110 S.Ct. at 2066 ("retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership," even if crime occurs on reservation); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 431, 109 S.Ct. 2994, 3008, 106 L.Ed.2d 343 (1989) (tribe's authority over reservation lands is limited to issues which "imperil the political integrity, economic security or the health and welfare of the tribe"); *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 152, 100 S.Ct. at 2080 (power to tax on reservation is "fundamental attribute of sovereignty" as long as it "significantly involv[es] a tribe or its members").

to such an entity.[13] Answers to these questions must be provided, in the first instance, by the district court.[14]

V

Our inquiry cannot end here, however, as all is for naught if Congress has divested the villages of any inherent authority or sovereignty to make child custody determinations. The state of Alaska contends that such a statutory divestiture exists. Public Law 83-280,[15] the state asserts, stripped the villages of whatever authority they may have had to make child custody determinations. Alaska contends, and the district court apparently agreed, that Public Law 280 vested the enumerated states with exclusive, not

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[13] The correlation between the present-day group of Indians and any historical sovereign entity need not be perfect. *See supra* p. 668 (recognizing that changes caused by adaptation do not necessarily destroy an entity's sovereign status). That the native village I.R.A. councils have existed for only some 53½ years is in no way dispositive of this issue.

[14] The issue of inherent sovereignty has been presented to us before, at least with respect to the Native Village of Venetie. *See State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1387 (9th Cir. 1988). As here, we concluded that whether the Native Village of Venetie was a "tribe" worthy of sovereign recognition was a question of fact to be answered by the district court. *See id.* The dissenting justices in *Native Village of Stevens v. Alaska Management & Planning*, 757 F.2d 82 (Alaska 1988), advocated the same general approach, concluding that the issue of the native villages' sovereignty was a question of fact. *See id.* at 93-96 (Rabinowitz J., dissenting).

[15] Public Law 83-280 is not codified at one place in the United States Code. The criminal and civil provisions appear in separate titles. *See* 18 U.S.C. § 1162 (1988) (criminal); 28 U.S.C. § 1360 (1988) (civil). In accordance with common usage, we shall refer to this public law simply as "Public Law 280."

merely concurrent, jurisdiction over civil and criminal matters involving Indians. *See Native Village of Venetie*, 687 F.Supp. at 1382 ("Some states, called 'Public Law 280 states,' operate under federal statutes stripping tribal courts of most of their traditional jurisdiction, and giving state courts jurisdiction over Indian country in most respects.").

Alaska buttresses this contention by invoking section 1918 of the Indian Child Welfare Act, which provides that "[a]ny Indian tribe which became subject to State jurisdiction pursuant to [Public Law 280] ... may reassume jurisdiction over child custody proceedings" by following certain procedures. 25 U.S.C. § 1918(a) (1988). Alaska contends that section 1918 would be a meaningless provision if Public Law 280 did not vest exclusive jurisdiction in the states; if jurisdiction is not exclusive in the states, Alaska asks, what is there for the native villages to "reassume" under section 1918?

We must begin our analysis of Alaska's argument with a brief overview of Public Law 280. Enacted in 1953, Public Law 280 mandated the transfer of civil and criminal jurisdiction over "Indian country" from the federal government to the governments of five states,[16] and permitted other states to assume such jurisdiction voluntarily. In 1958, Alaska was added to the list of mandatory Public Law 280 jurisdictions. See Act of Aug. 8, 1958, Pub.L. No. 85-615, § 2, 72 Stat. 545. The civil portion of Public Law 280 provides as follows:

> Each of the [mandatory Public Law 280] States ... shall have jurisdiction over civil causes of

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[16] The five states were California, Minnesota, Nebraska, Oregon, and Wisconsin.

> action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

28 U.S.C. § 1360(a) (1988). It is not disputed that private adoption cases are included within this transfer of civil jurisdiction from the federal government to the states.

Although Public Law 280 was enacted during Congress's so-called "termination era" methodology of dealing with Indians,[17] the law "plainly was not intended to effect total assimilation of Indian tribes into mainstream American society." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208, 107 S.Ct. 1083, 1087, 94 L.Ed.2d 244 (1987). The legislative history behind Public Law 280 is sparse, but Congress's primary motivation in enacting the legislation seems to have been a desire to remedy the lack of adequate criminal-law enforcement on some reservations. *See, e.g.*, S.Rep. No. 699, 83d Cong., 1st Sess., *reprinted in* 1953 U.S.Code Cong. & Admin.News 2409, 2412 ("[T]here has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States

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[17] *See* Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 U.C.L.A. L.Rev. 1051, 1067 n. 68 (1989) (summarizing general scholarly division of federal Indian policy into five discrete periods and noting that "termination era" lasted from 1943 to 1961).

indicating an ability and willingness to accept such responsibility."); *see also Bryan v. Itasca County*, 426 U.S. 373, 379, 96 S.Ct. 2102, 2106, 48 L.Ed.2d 710 (1976) ("The primary concern of Congress in enacting Pub.L. 280 ... was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement."); Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L.Rev. 535, 540-44 (1975). In fact, certain tribes were exempted from the provisions of Public Law 280 because these tribes had a "'tribal law-and-order organization that function[ed] in a reasonably satisfactory manner.'" *Bryan*, 426 U.S. at 385, 96 S.Ct. at 2109, (quoting H.R.Rep. No. 848, 83d Cong., 1st Sess. 7, *reprinted in* 1953 U.S.Code Cong. & Admin.News 2413). In short, Public Law 280 was designed not to supplant tribal institutions, but to supplement them.

The Supreme Court has also adopted the view that Public Law 280 is not a divestiture statute. *See Cabazon Band of Mission Indians*, 480 U.S. at 207-12, 107 S.Ct. at 1087-90; *Bryan*, 426 U.S. at 383-90, 96 S.Ct. at 2108-12; *see also Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir.1990) ("Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their own members for violations of tribal law. Nothing in the wording of Public Law 280 or its legislative history precludes concurrent jurisdiction."). In *Bryan*, the Court observed that "nothing in [Public Law 280's] legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than

'private voluntary organizations.'" 426 U.S. at 388, 96 S.Ct. at 2111 (quoting *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975)). The Court has rejected all interpretations of Public Law 280 which would result in an undermining or destruction of tribal governments. *See, e.g., Cabazon Band of Mission Indians*, 480 U.S. at 222, 107 S.Ct. at 1095 ("[s]tate regulation [of tribal bingo operation] would impermissibly infringe on tribal government" and therefore is not within Public Law 280's jurisdictional grant); *Bryan*, 426 U.S. at 388, 96 S.Ct. at 2110 ("[U]ndermining or destruction of such tribal governments ... [is] a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments.")

In addition, the so-called mandatory Public Law 280 states have, to the extent that they have addressed the issue, considered jurisdiction to be concurrent under Public Law 280. The Wisconsin Attorney General has opined that "[f]or nonregulatory proceedings, such as voluntary termination of parental rights, the tribal courts, and state courts pursuant to Pub.L. 280, have concurrent jurisdiction." 70 Op. Att'y Gen. Wisc. 237, 243 (1981). Likewise, the Attorney General for the State of Nebraska has written: "[U]nder Public Law 280 the tribe retained substantial inherent tribal authority over civil matters arising in Indian country. While some of this tribal jurisdiction and authority may have been concurrent with state jurisdiction (i.e., existing together with it), or while the Tribe may have chosen not to exercise all of its authority and jurisdiction, nonetheless that tribal jurisdiction and

authority was always there." Opinion No. 48, Opinion Letter from Robert M. Spire, Attorney General (Charles E. Lowe, Ass't Att'y General) to State Senator James E. Goll (March 28, 1985).

Finally, we note that Congress was aware, while drafting the Indian Child Welfare Act, that the U.S. Department of Justice viewed Public Law 280 as providing for concurrent jurisdiction among state and tribal courts. Then-Assistant Attorney General for Legislative Affairs Patricia M. Wald wrote to Interior and Insular Affairs Committee Chairman Morris K. Udall: "As you may be aware, the courts have consistently recognized that tribal governments have exclusive jurisdiction over the domestic relationships of tribal members located on reservations, *unless a State has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83-280.*" Letter from Assistant Attorney General Patricia M. Wald to Hon. Morris K. Udall (Feb. 8, 1978), included in H.R.Rep. No. 1386, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S.Code Cong. & Admin.News 7530, 7558 (emphasis added).

In spite of the foregoing, Alaska suggests that section 1918 of the Indian Child Welfare Act would be rendered meaningless by any non-divestiture interpretation of Public Law 280. However, the two statutes can be harmonized without construing Public Law 280 as a divestiture statute. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018, 104 S.Ct. 2862, 2880, 81 L.Ed.2d 815 (1984) (statutes capable of being harmonized should be so construed). The relevant portions of the Indian Child Welfare Act enable the Secretary of the Interior to grant to a tribe, upon receipt of a proper petition, exclusive jurisdiction (over

all or a portion of the appropriate "Indian country") or referral jurisdiction of child-custody proceedings. *See* 25 U.S.C. § 1918(b)(2) (1988). Each of these types of jurisdiction is broader than any tribal jurisdiction which is concurrent with the states. Exclusive jurisdiction, of course, is clearly broader than concurrent jurisdiction. Likewise, referral jurisdiction is broader in scope than concurrent jurisdiction, in that referral jurisdiction is concurrent *but presumptively tribal* jurisdiction. *See id.* § 1911(b). Thus, there is something for a tribe to "reassume" under section 1918—namely, exclusive or referral jurisdiction—even if Public Law 280 is read as not divesting the tribes of concurrent jurisdiction.

In sum, giving the benefit of doubt to Alaska, we conclude that Public Law 280 and the Indian Child Welfare Act are, at best, ambiguous as to whether states have exclusive or concurrent jurisdiction over child custody determinations where the tribe has not petitioned for exclusive or referral jurisdiction. Of course, ambiguities are to be resolved to the benefit of Indians. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985). Accordingly, resolving the jurisdictional ambiguities in favor of the villages, we hold that neither the Indian Child Welfare Act nor Public Law 280 prevents them from exercising concurrent jurisdiction. If the native villages of Venetie and Fort Yukon are sovereign entities which may exercise dominion over their members' domestic relations, Alaska must give full faith and credit to any child-custody determinations made by the villages' governing bodies in accordance with the full faith and credit clause of the Indian Child Welfare Act.

VI

We affirm the district court's grant of summary judgment insofar as it dismissed the plaintiffs' claims for damages or other retroactive relief. However, we reverse the district court's order granting summary judgment to Alaska on the plaintiffs' claims requesting injunctive or declaratory relief. On remand, the district court must determine whether the native villages of Venetie and Fort Yukon are the modern-day successors to an historical sovereign band of native Americans. If the district court determines that either village is a successor to such a sovereign, it must provide the relief necessary to ensure that the state of Alaska affords full faith and credit to adoption decrees issued by the tribal courts of the native village.

Parties will bear their own costs.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

FILED
OCT 14 2009
MOLLY C. DWYER,
CLERK
U.S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KALTAG TRIBAL COUNCIL; HUDSON SAM; SALINA SAM,

Plaintiffs – Appellees,

v.

KARLEEN JACKSON, in her official capacity as Commissioner of Alaska Department of Health and Social Services; BILL HOGAN, in his official capacity as Deputy Commissioner of Alaska Department of Health and Social Services; and PHILLIP MITCHELL, in his official capacity as Section Chief of the Alaska Bureau of Vital Statistics,

Defendants – Appellants.

No. 08-35343

D.C. No. CV-06-211-TMB

ORDER

ORDER

Before: FARRIS, THOMPSON and RAWLINSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny appellants' petition for rehearing. Judge Rawlinson has also voted to deny their petition for rehearing by the court en banc, and Judges Farris and Thompson have recommended denial of that petition.

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petitions for panel rehearing and for rehearing by the court en banc are DENIED.

25 U.S.C. § 1901
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes[1]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often

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[1] So in original. Probably should be capitalized.

unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1902
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1903
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for

adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

* * *

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43;

* * *

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or

individual subject to a restriction by the United States against alienation;

* * *

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

25 U.S.C. § 1911
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE
SUBCHAPTER I. CHILD CUSTODY PROCEEDINGS

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an

Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 U.S.C. § 1912
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE
SUBCHAPTER I. CHILD CUSTODY PROCEEDINGS

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or

termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian

custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1913
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE
SUBCHAPTER I. CHILD CUSTODY PROCEEDINGS

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian

child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

25 U.S.C. § 1918
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE
SUBCHAPTER I. CHILD CUSTODY PROCEEDINGS

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be

provided pursuant to any agreement under section 1919 of this title.

25 U.S.C. § 1919
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE
SUBCHAPTER I. CHILD CUSTODY PROCEEDINGS

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

25 U.S.C. § 1922
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE
SUBCHAPTER I. CHILD CUSTODY PROCEEDINGS

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

VILLAGE OF KALTAG CONSTITUTION AND LAWS

.....SECTION ONE.....

PART 1

We, the residents of Kaltag, recognize the Law of God and the law of the country to be the Law of our Village.

In order to better observe these laws and make our village a happy place for ourselves and our children, we pledge:

1—our mutual cooperation among all who live here

2—our respect and submission to our elected leaders and their decision.

PART 2

We further establish the following Constitution and Laws to be observed by all who live or visit in the village.

Criticism of these articles or opposition to the Village Council may be freely voiced by anyone at a meeting called for the purpose, but shall not be tolerated at any other time.

VILLAGE GOVERNMENT

We delegate to our council the authority they need to be our effective leaders.

PART 3

VILLAGE COUNCIL: Is composed of five members, elected for one year. In the absence of some members of the council, those in the village at the time will assume all powers and duties of the council.

PART 4

ELECTIONS: Shall take place once a year, at the beginning of the school term, as soon as everybody is back in the village.

PART 5

CANDIDATES: Men or women are eligible. The candidates for office shall volunteer to serve the council, they will give their names to the Secretary at least 48 hours before the date set for elections, and these names shall be posted in public places at the same time.

PART 6

RIGHT TO VOTE: All residents of the village who have reached the age of 18 have a right to cast a ballot.

PART 7

ELECTIONS: They shall take place at a public meeting called for the purpose, and are decided by the majority of the ballots cast.

PART 8

Once the council members have been elected, successive ballots shall be cast to select among them the President, Vice President, Secretary and Treasurer.

PART 9

All balloting shall be by secret ballots: they are counted by the President and verified by the Secretary and the other Councilmen.

PART 10

If two candidates receive the same number of votes, a new ballot shall be taken to break the tie: if this is not successful, the two candidates shall draw for the winner (flip a coin, or draw names on slips of paper).

PART 11

Immediately upon being elected, the new officers will assume their positions and take the following oath of office:

PART 12

"I ..... conscious of my responsibility toward God and my fellow citizens, solemnly promise to fulfill to the best of my abilities all the obligations of the Office to which I have been elected. So Help me God."

.....SECTION TWO.....

PART 1

DUTIES OF THE COUNCIL: The councilman shall take their office and its responsibilities very seriously and at all times give good example and work for the good of all those who live in the Village.

PART 2

It is their responsibility to take the initiative necessary for the welfare and happiness of the village, and the development of our resources.

PART 3

If any councilman is guilty of public drunkenness, disorderly conduct or other serious offense, the council shall meet to require his resignation and provide for a partial selection to replace him.

PART 4

THE PRESIDENT:

- Shall be chairman of all meetings
- represent the village interests in dealing with outsiders
- consider himself more personally responsible for the execution of the laws and the village welfare

In his absence, the Vice President, then the Secretary and the Treasurer shall assume his duties.

PART 5

THE SECRETARY: Shall keep a written record of all the meetings.

Shall be responsible for the safekeeping of all correspondence and other documents pertaining to village affairs.

PART 6

THE TREASURER: Shall keep an exact record of all monies received or spent.

- A majority decision of the council is necessary to spend money for minor expenses; but larger amounts can be spent only after they have been approved by a village meeting.

PART 7

POWER OF THE COUNCIL: To make any ORDINANCE they judge necessary for the common good. An ordinance is a temporary order issued by the council: it may be come a permanent law if it is ratified by a village vote.

PART 8

To impose fines or public work if it becomes necessary to enforce this Constitution and Laws.

PART 9

To act as judges of minor offenses or small differences among village residents. These small matters, we should always try to settle among ourselves.

PART 10

HOWEVER, everyone conserves his right to take up these matters with any proper authority. The council shall not act in serious matters, but has the duty to report them to proper authorities.

PART 11

MEETINGS: (council meetings): shall meet regularly, at least twice a month during the first and third week.

PART 12

Anyone can request to appear before the council at these meetings, the councilmen can request anyone to be present if they judge it necessary.

In urgent matters, anyone can request a special meeting to be held, if this request is backed by at least fifteen signatures.

.....SECTION THREE.....

PART 1

Village meetings: They shall be announced with their subject matter and notices posted to that effect at least 24 hours in advance.

PART 2

All meetings are to open at the exact time, regardless of the number of people present or absent, and the decisions approved by the majority of those present are binding on all. However, in very important matters, such as elections, a minimum of 25 people present shall be required to constitute a quorum.

PART 3

MEETINGS, PROCEDURE: All meetings are presided over by a Chairman, and current parliamentary procedure is to be followed: motions and

standing votes, unless the Chairman or a single motion from the floor requests a secret ballot.

PART 4

PERSONAL RESPONSIBILITY: All village residents shall consider it their business to promote happiness, peace and order in the village; they must assist their council in every possible way to make their work and responsibility as light as possible.

PART 5

Anyone knowing any serious abuse or evil shall report it to the council or to proper authorities; he shall be ready to prove his charges and to be confronted with the defendant. No one shall ever speak of such matters with those who have no power to stop them. Malicious gossip and calumny shall never be tolerated.

PART 6

CHANGES IN CONSTITUTION AND LAWS: They can be made if 2/3 of the qualified voters favor a constitutional change. A simple majority of the voters is sufficient to change existing laws or to introduce new ones.

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LAWS

CHILDREN: The parents are responsible for the conduct of their children and for any damage they may cause. Unless accompanied by their parents, all school children shall be home by 9 P.M. Parents shall be fined 50 cents anytime they fail to make their children follow this order.

DOGS: To safeguard children and property, all dogs 4 months or older shall be securely tied at all times. Any dog habitually loose may be destroyed by anyone.

PEACE AND ORDER: Drunkenness or disorderly conduct shall be punishable by fines from 5 to 10 dollars. The fine shall be doubled if the guilty party refuses to obey peacefully when ordered to go home.

PROTECTION OF PROPERTY: Anyone who witnesses stealing or damaging property must do everything in his power to stop it and has a duty to report it to the council, especially when it is a question of locked houses or boats on the beach.

HEALTH AND SAFETY: The council shall appoint one of its members to be Health and Safety Officer. His duties are:

– Safe disposal of garbage at designated places

– Removal of fire or accident hazards in the village: dry grass, snow drifts or ice on sidewalks, etc.